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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

PYRAMID SECURITIES LIMITED,

Petitioner,

v.

IB RESOLUTION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. McMANUS
(Counsel of Record)
WARREN LUTZ
MICHAEL S. LEVINE
JACKSON & CAMPBELL, P.C.
Suite 300 South
1120 20th Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner

June 24, 1991

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20006

QUESTIONS PRESENTED

1. Does the manner in which a court applies summary judgment, by failing to weigh the evidence and all reasonable inferences drawn therefrom in favor of the non-moving party, and by resolving all genuine issues of material fact against the non-moving party, violate that party's constitutional right to a jury trial pursuant to the Seventh Amendment?

2. Does this misapplication of summary judgment to a cause of action brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) improperly limit the Congressionally mandated broad remedial scope and purpose of that Act?

3. Is *Grunewald v. United States*, 353 U.S. 391 (1957) proper authority for the proposition that acts of concealment designed to further a conspiracy may not be considered in analyzing the pattern element of a RICO cause of action?

4. Does a defendant's conduct, designed to conceal its participation in wrongdoing from the victim, act to implicate the doctrine of fraudulent concealment when applying a statute of limitations?

LIST OF PARTIES

The parties to the Court of Appeals proceedings were Pyramid Securities Ltd., Appellant; IB Resolution, Inc., successor of International Bank by merger, Appellee. The parties to the district court proceedings were Pyramid Securities Ltd., plaintiff; International Bank, defendant.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, dated February 1, 1991, is set forth in Appendix A to this petition. It is reported at 924 F.2d 1114 (D.C. Cir. 1991).

The opinion of the District Court, dated December 19, 1989, is set forth in Appendix B to this petition. It is reported at 726 F.Supp. 1377 (D.D.C. 1989). The first opinion of the District Court, dated Dec. 29, 1988, unreported, is also set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1991. Appellant's Motion for Rehearing and Suggestion for Rehearing *en banc* were denied on March 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The United States Constitution, Amendment VII provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.* (RICO) provides, in pertinent part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person had participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c), of this section.

Federal Rule of Civil Procedure 56 provides, in pertinent part:

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT

This petition seeks review of the grant of a motion for summary judgment under Fed. R. Civ. P. 56 on behalf of defendant-appellee IB Resolution, Inc. ("IBR") by the United States District Court for the District of Columbia, which was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.

Petitioner Pyramid Securities Limited ("Pyramid") does not challenge whether or not the device of summary judgment violates the Seventh Amendment right to a jury trial, as this Court has already determined that it does not. Rather, petitioner advocates that the way in which the summary judgment device is implemented may violate that right, which is most fundamental to our history and jurisprudence.

The grant of summary judgment resulted from the district court and circuit courts' failure to follow established summary judgment precedent. Where multiple reasonable inferences could be drawn from the significant facts, the courts below drew inferences in favor of the moving party, and viewed critical evidence in a light most favorable to the moving party. The courts below used the summary judgment mechanism to reach the merits of the case by impermissibly weighing the evidence as a fact-finder, and resolving genuine issues of material fact, thereby denying plaintiff-appellant its right to a jury trial on those issues.

As a result of this factual determination, the extent and scope of the Racketeer Influenced and Corrupt Organizations Act ("RICO") wrongdoing alleged by the plaintiff was severely curtailed. The facts and the inferences drawn therefrom, as decided by the lower courts, were then held legally insufficient to support plaintiff's RICO claims, or to survive a statute of limitations challenge to the common-law claims. The result is a decision that significantly narrows the broad remedial scope of RICO intended by the Congress and affirmed by this Court, and contradicts the purpose of statutes of limitations.

The lower courts achieved this dubious result in two steps: after gutting Pyramid's complaint through their resolution of certain evidentiary issues, the lower courts then misapplied RICO jurisprudence to what they left remaining. Three months of systematic racketeering was held to be insufficient to satisfy the "continuity" prong of the RICO pattern element, despite evidence that such misconduct would project into the future. This ruling conflicts with *H.J., Inc., v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (1989) where this Court held that the threat of prospective racketeering activity satisfies the continuity requirement. Moreover, the circuit court's ruling directly contradicts its own recent decision in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132 (D..C. Cir. 1989). There, the concept of threatened, prospective racketeering ("open-ended" threat), as defined in *H.J. Inc.*, was applied and the "continuity prong" was deemed satisfied based upon four acts of racketeering over a four-day period. Here, the evidence offered by Pyramid established a threat of future racketeering far more compelling than that found in *Yellow Bus*. That evidence demonstrated that the racketeers established a mechanism to manipulate plaintiff's securities well beyond three months. Notably, the court below failed to distinguish, or even cite, *Yellow Bus*. As a result, the District of Columbia Circuit has now issued contrasting decisions applying the "open-ended" standard, and it is necessary to resolve this conflict to ensure the uniformity of decisions.

Further, the circuit court's decision cannot be squared with other decisions of its own, or of this Court, concerning the legal significance of misconduct intended to conceal conspiracy. The lower court ruled that three years of active concealment, whether designed to evade liability or to further an ongoing criminal scheme, is not properly part of a criminal conspiracy and, thus, the initial misconduct (three-months of churning) was too brief to satisfy the "continuity" prong of the RICO pattern element. This ruling resulted from misplaced interpretation of and reliance on *Grunewald v. United States*, 353 U.S. 391 (1957), a case decided before the enactment of RICO, and disregard for decisions holding that concealment of past criminal

conduct may further the objectives of a criminal conspiracy, and thus be considered part of the continuing conspiracy. This unduly restrictive interpretation raises an issue of exceptional importance. The court's application of *Grunewald* to RICO destroys an otherwise valid RICO pattern and encourages the concealment of racketeering, a narrowing consequence not contemplated by the statute, or this Court's broad interpretation of it.

The lower courts also misapplied summary judgment standards in analyzing and deciding the statute of limitations issue. Acknowledging that "if the issue were purely one of probabilities, Pyramid's evidence might be enough to sneak past summary judgment," *Pyramid Securities, Ltd. v IB Resolution, Inc.*, 924 F.2d 1114, 1124 (D.C. Cir. 1991) (App. 19a),[1] the circuit court tacitly admitted that there were facts supporting Pyramid's position. Since a jury need only find that a plaintiff's evidence in a civil case is more probable than not, it would appear that a genuine issue of material fact existed. The court nonetheless engaged in its own qualitative weighing of the evidence and granted summary judgment.

Moreover, the lower courts erroneously held that the statutes of limitations applicable to Pyramid's state law claims should run from the time Pyramid allegedly received some information suggesting irregularities by the defendant, rather than when it actually knew of its claims against this defendant. This ruling contradicts several decisions of the District of Columbia Circuit, including *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989), where defendant's fraudulent concealment prevented plaintiff from acquiring notice of its claims, thus tolling the statute of limitations.

For each of these issues, on summary judgment the lower courts impermissibly drew inferences of fact in favor of appellee, not appellant, deciding the case like a first instance judgment on the merits after hearing and resolving all questions of evidence and credibility. This is reversible error.

[1]Unless otherwise noted, all citations to the lower courts' opinions are to the Court of Appeals' decision, *Pyramid Securities, Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114 (D.C. Cir. 1991) ("*Pyramid*"), with the appendix reference following ("App. ____").

A. Facts

Pyramid was defrauded through a four-year conspiracy involving its bank, Washington International Bank and Trust ("WIBT"), a wholly-owned subsidiary of IBR. In late 1981 securities held by Pyramid were improperly churned, involving approximately $4.5 million in fraudulent transactions. Thereafter, WIBT and its officers engaged in mail fraud, wire fraud, and obstruction of justice through perjury by concealing the bank's misconduct and causing further injury to Pyramid.

Pyramid was incorporated in 1980 in the British Virgin Islands. Its principal place of business is in the Cayman Islands, British West Indies.

WIBT is an alien corporation operating as a bank organized and licensed under the laws of the Cayman Islands, British West Indies. The original defendant to this action was International Bank ("IB"), WIBT's parent corporation. IB was an Arizona corporation with its principal place of business in the District of Columbia.[2]

Pyramid was formed by Edward J. Attridge ("Attridge") at the suggestion of Nicholas J. Duggan ("Duggan"), WIBT's President, to trade securities for its own account. Attridge relied heavily upon Duggan for investment advice due to Attridge's limited education and financial experience. WIBT and Duggan assisted Attridge with the formation or operation of companies held by Attridge, including Pyramid.

Duggan introduced Attridge to securities brokers and helped Pyramid establish accounts in the United States and Canada, traveling with Attridge to establish business relations for his companies. Between 1978 and at least 1986 WIBT maintained its own account with E.F. Hutton & Co. ("Hutton") in Florida. In June 1981 Pyramid followed WIBT's recommendation and entered into a brokerage agreement with Linda Pearson ("Pearson") of Hutton.

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[2]During the course of this lawsuit IB sold WIBT, and IB itself recently has been merged into IB Resolution, Inc. (IBR).

WIBT directly purchased and sold stock on behalf of Pyramid through Hutton in West Palm Beach, Florida. WIBT communicated with brokers to discuss securities trading for Pyramid. Pyramid paid WIBT an "activity fee", or commission, to administer Pyramid's brokerage accounts, based on trading activity.

WIBT paid or arranged for the payment of purchases of securities on behalf of Pyramid. All trades in and out of Pyramid's brokerage account were to be confirmed by direct Telex to WIBT and verified as close to the time of trading as possible. Stock trading could not take place without the bank's participation.

Coopers & Lybrand was engaged as Pyramid's outside accounting firm in the fall of 1980. From that time forward until September 1981, WIBT forwarded to Coopers & Lybrand all securities transactions slips after WIBT had verified the trades, recorded pertinent information, and matched these slips with the corresponding telexes from the brokers.

Pearson and WIBT had authority to trade securities on Pyramid's behalf until August 31, 1981, when Attridge advised WIBT, Duggan, Hutton and Pearson, that he would be traveling on his honeymoon for several months, and that all trading on Pyramid's account should cease. As a result of his impending marriage, Attridge had decided to end daily securities trading, in order to hold the portfolio for long-term investment purposes.

Despite Attridge's directive, Pearson continued to trade between August 31, 1981 and November 1981, churning approximately $4.5 million in securities. Due to his travel Attridge had no knowledge of this trading. Returning to the Cayman Islands in late November 1981, Attridge discovered that Pyramid's Hutton account balance had been reduced from approximately $890,000 to approximately $40,000. At that time, he knew only that certain stocks then identified as comprising Pyramid's portfolio were not its own.

Attridge made immediate inquiries to Pearson and WIBT. Until April 1982 Pearson maintained that this low account balance was due to accounting errors. WIBT denied any knowledge of what might

have happened. Duggan and other bank officers assured Pyramid that WIBT had received none of the standard trading documents from Hutton after August 31, 1981, and thus had no knowledge of any trading activity after that date. WIBT did not charge Pyramid an "activity fee" for any trading after August 31, 1981, thereby corroborating the bank's position (and thus Pyramid's belief) that there had been no trading. After August 31, 1981, Coopers & Lybrand did not receive any of the usual trade documentation for Pyramid's account; specifically, Coopers never received any trade documentation for the $4.5 million of churned trades. At the time, Coopers was not surprised that no documentation was passed on to it because Coopers knew that Pyramid had directed that all trading be stopped.

In the first part of 1982, in response to Pyramid's request to the bank for assistance in determining what had happened to its account, WIBT wrote to Hutton in West Palm Beach, Florida, using the U.S. mail, stating that it had not received trading statements for the second half of 1981. WIBT requested that such statements be forwarded to it, as if the bank had no knowledge of the voluminous unauthorized trading that had taken place. Thereafter, WIBT provided Pyramid with copies of this correspondence as further evidence that the bank had received no notice of trading activity.

Pyramid did not discover actual fraud by Pearson until June, 1983, when it was advised by Ernst & Whinney that Ernst & Whinney's investigation of Pyramid's account led to the conclusion that $4.5 million in securities had been churned through the account. Following this investigation, Pyramid commenced suit in Florida against Hutton and Pearson, alleging that Pearson had churned Pyramid's account. During that litigation WIBT and its officers continually assured Pyramid that the bank had no knowledge of the unauthorized trading. In November 1984, Duggan and other WIBT officers testified on deposition that they were aware that there was to be no trading on Pyramid's account after August 31, 1981, and that they had no knowledge or notice of trading after that date.

In December 1985, however, now four years following the chur-

ning, Duggan admitted to Pyramid for the first time that WIBT had participated in the illegal trading, and had knowledge of the unauthorized trading as it occurred. The bank had actively concealed its participation in the churning for over four years. Hutton and Pearson settled Pyramid's lawsuit against them shortly thereafter. Duggan's admission subsequently was corroborated by a WIBT bank ledger, which recorded each of the numerous unauthorized trades. The ledger was analyzed when eventually obtained by Pyramid in 1986, and compared with other trade documents to establish its relation to the illegal trading. Pyramid expended enormous amounts of time and money pursuing Pearson and Hutton, who vehemently denied that any churning or unauthorized trading occurred. All that time, WIBT and Duggan had information key to the matter, yet not only did they remain silent about the evidence of the trading in their possession, they lied about their participation. Concealment of their complicity in it was concealment of the scheme and the conspiracy.

B. Proceedings in the District Court

The original complaint filed by Pyramid demanded compensatory and punitive damages from IB for breach of contract, breach of fiduciary duty, negligence, civil conspiracy, fraud, and violation of RICO. Jurisdiction was founded upon diversity of citizenship and amount, authorized by 28 U.S.C. § 1332, and upon the existence of a federal question and amount in controversy, authorized by 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331. Pyramid demanded trial by jury on these claims.

In Count I, Pyramid alleged breach of the contractual relationship which existed between Pyramid and WIBT, the subsidiary of IB. Count II alleged breach of WIBT's fiduciary duty. Pyramid had placed special trust and confidence in the integrity and fidelity of WIBT, its president (Duggan) and defendant, IB. Count III alleged negligence on the part of WIBT in that it failed to perform its many investment, accounting and general banking duties with reasonable care. Count IV asserted that WIBT, Duggan and Pearson knowingly and intentionally combined, conspired, confederated and agreed

to perform various acts which caused substantial economic damage to Pyramid. Among these acts was the fraudulent conversion by Pearson of Pyramid's securities, monies and property for her own use; failure by WIBT and Duggan to take any affirmative action to prevent the unauthorized trading of the Pyramid account; and the affirmative act by WIBT and Duggan of concealing the unauthorized trading. Count V alleged that, despite knowledge of the churning of Pyramid's account, WIBT and Duggan failed to disclose to Pyramid any information concerning the wrongful acts, and represented to Pyramid that they had no knowledge of any wrongful acts. Such failure to disclose amounted to an intent to deceive Pyramid.

Count VI asserted that Pearson, Hutton, Duggan and WIBT knowingly combined, conspired, agreed and confederated to conduct their operations as an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, through a pattern of racketeering activity, and to conceal that fact from Pyramid, all in violation of RICO (18 U.S.C. § 1962(c)-1962(d)). In conjunction therewith, Pyramid alleged that Pearson had, in violation of 18 U.S.C. § 2314, improperly converted by fraud Pyramid's securities, money and property in excess of $5,000; and that Pearson, in furtherance of the fraudulent scheme, had mailed numerous fraudulent writings, and wired various fraudulent communications, in violation of 18 U.S.C. §§ 1341, 1343, respectively.

IB timely answered and asserted several grounds of defense.

On April 14, 1988, IB moved to dismiss the complaint, raising six challenges: (1) lack of subject matter jurisdiction; (2) statutes of limitations; (3) *forum non conveniens;* (4) failure to state a claim under RICO; (5) plaintiff had received full satisfaction for its claims; and (6) plaintiff cannot pierce the corporate veil. The district court, treating the motion as a motion for summary judgment and recognizing that certain of Pyramid's contentions, if properly supported, "may have merit," denied the motion without prejudice, by order dated December 29, 1988. Specifically, the court stated that the record did not support IB's statute of limitations arguments in that it was not clear when Pyramid became aware, or should have become

aware of WIBT's confederacy; and that Pyramid's RICO claims had not been shown to be clearly inadequate as a matter of law. The district court then lifted the stay it had earlier placed on discovery proceedings.

On July 31, 1989, after several months of discovery, IB filed a renewed motion to dismiss, asserting four grounds: (1) failure to state a claim under RICO; (2) lack of subject matter jurisdiction; (3) plaintiff had received full satisfaction for its claims; and (4) *forum non conveniens*. IB stated that in view of the district court's December 29, 1988 order it would not reargue its defenses based upon the statute of limitations, and no new evidence was offered on that issue. Although requested by Pyramid, no oral argument was held.

In its renewed motion, IB relied on little of the discovered materials which the trial court had determined would be necessary to support its initial motion. Nonetheless, the district court granted the renewed motion, in part because it found that Pyramid had failed to raise a genuine issue of material fact regarding the "pattern" element of the RICO claim.

The district court also held that the remaining state law claims were time-barred, asserting that a reasonable finder of fact would conclude that Pyramid knew, or reasonably should have known by no later than November, 1984, that it had a cause of action against IB. This was remarkable in view of the fact that the statute of limitations issue had not been raised in the renewed motion, nor was any additional information presented to the court that would have supported the argument had it been raised.

C. Proceedings in the Court of Appeals

On appeal, the Court of Appeals (Williams, J.) held that, even assuming WIBT engaged in some acts of racketeering, this racketeering did not amount to a pattern sufficient to satisfy the requirements of either an "open-ended" or "closed-ended" period established by this Court in *H.J., Inc.* In several instances the cir-

cuit court advanced its own theories as to the significance of important pieces of evidence - evidence which, had it been properly viewed in a light most favorable to the non-movant, would have tended to establish the requisite predicate acts under RICO.

The circuit court also affirmed summary judgment dismissing Pyramid's state law claims. Relying on a 1987 affidavit in which Pyramid's president had asserted that the secret ledger was first produced in November of 1984, the circuit court refused to consider ample evidence which a reasonable jury could have found supported an honest repudiation of the prior statement, and more importantly, competent evidence on which a reasonable jury could conclude that in fact Pyramid did not know of the ledger's contents until December of 1985.

Pyramid petitioned for a rehearing with a suggestion for rehearing *en banc*, which petitions were denied on March 25, 1991.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law regarding the proper standards to be applied in ruling on Rule 56 motions for summary judgment.

Of particular significance is the question of whether or not the manner in which Rule 56 is applied can affect a litigant's Seventh Amendment right to a jury trial on issues of disputed fact. In this case the problems associated with that question are compounded by the impact of the lower courts' rulings on the continued effectiveness of RICO claims. Specifically, this petition asks whether the district court and circuit court have misapplied long-settled summary judgment standards, in derogation of the Seventh Amendment; whether the standards handed down by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574 (1986) are properly limited to the context of libel/defamation and antitrust, respectively, as is suggested therein; and, given the direction by this Court to broadly interpret RICO to effectuate its Congressionally

mandated remedial purpose, whether it is appropriate for this Court to establish guidelines for the disposition by summary judgment of RICO claims.

1. Federal Courts in the District of Columbia are misapplying settled summary judgment standards. Rule 56 is not intended to allow a trial court to reach and decide the merits of a case where genuine issues of material fact exist. That is the function of the jury. In *Anderson*, this Court clarified the general rule that "summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The Court also expounded on the differing roles of the judge and jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [and] . . . the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970)). *See, also, Matsushita,* (" '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' " *Id.* at 587 (citing *United States v. Diebold*, 369 U.S. 654, 655 (1962)); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (" 'summary' procedures should be used sparingly . . . where motive and intent play leading roles, [and] the proof is largely in the hands of the alleged conspirators" (citing *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962)).

2. Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The relevant inquiry of a district court confronted with a summary judgment motion is to therefore determine whether or not such genuine issues exist; if they do, the inquiry ends and Rule 56 is not applicable. The district court below went well beyond that. While expressing its acknowledgment of the appropriate standards to be used in applying Rule 56, the court

nonetheless failed to comply with those standards by instead weighing the evidence and drawing all inferences from the underlying facts in favor of the moving party. Having thus resolved the genuine issues confronting it, the court then adopted its singular resultant findings of fact as a basis on which to state that no genuine issues of fact existed — a classic example of Catch-22. Such a merit determination expressly violates Rule 56.

3. On appeal, the circuit court compounded the error of the district court in the same manner. It is not sufficient to merely acknowledge the proper standards for reviewing a case on summary judgment by reciting them in rote fashion. The standards and the principles behind them must be strictly followed through each step of a case analysis, and resolution of conflicts in the evidence and all reasonable inferences from the underlying facts must truly be drawn in favor of the nonmovant.

While citing *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989), for the proposition that ". . . all serious conflicts of evidence . . . [must be resolved] . . . in Pyramid's favor . . ." *Pyramid*, 924 F.2d at 1116 (App. 4a), contrary to the limitations articulated in *Anderson* or *Matsushita*, the circuit court impermissibly broadened its authority by drawing all inferences in favor of IBR, rendering a merits decision on the basis of its weighing of the resulting evidence. The court used summary judgment to improperly decide the merits of the case where there were genuine (and expressly acknowledged by the court) issues of material fact. This application of Rule 56 denied Pyramid its Seventh Amendment right to a jury trial on significant factual issues underlying its claims.

4. "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the court." *Jacob v. City of New York*, 315 U.S. 752, 752-753 (1942). "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence

that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." *Dimik v. Scheidt*, 293 U.S. 474, 486 (1935). And, as noted by then-Justice Rehnquist in his dissent to the Court's opinion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979): "Jurors bring to a case their common sense and community values; their 'very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.' " *Id.* at 355.

5. Pyramid recognizes that in reviewing this petition this Court will have only the lower courts' written opinions to guide it in perceiving the facts on which the lower courts based their legal determinations. Pyramid also recognizes that this would ordinarily present a challenge difficult for a petitioner to overcome, because it is ordinarily inherent that the facts cited in such opinions support the court's actions and analysis. But here, Pyramid respectfully submits that multiple competing inferences are acknowledged by the circuit court in its written opinion, with the court rejecting those favorable to the nonmovant and adopting as fact those favorable to the movant. Two examples are illustrative, though by no means exclusive.

First, the circuit court ignored clear and obvious facts and inferences favoring Pyramid. For example, the court indicated its unwillingness to accept in Pyramid's favor even the most basic premise of its case, that the bank participated in the churning of Pyramid's account. "Pyramid has failed to support its claim that Washington International ever plotted to participate in any criminal activity other than the churning that ended in November 1981 (*assuming it did even that*)" *Pyramid*, 924 F.2d at 1119 (App. 10a) (emphasis added).

In the first place, it is submitted that churning an account dozens of separate times over a three-month period in violation of a fiduciary duty is sufficient to fall within the scope of this court's delineation of RICO liability as set forth in *H.J., Inc.*

In the second place, while acknowledging that ". . . at least a scrivener at the bank was aware . . ." of the unauthorized trades *Pyramid*, 924 F.2d at 1116 (App. 3a), the court inexplicably con-

cluded as fact that only the broker Pearson participated in the churning. Uncontroverted evidence, however, established that the bank was not only aware of the unauthorized trading, having recorded each trade in its ledger book as they occurred, but of Pyramid's order that all trading was to have halted as of August 31, 1981. It was also uncontroverted that procedures between Pyramid and the bank made it impossible for trades to occur without the bank's participation. Those procedures required a bank officer to approve all trades before execution and recordation, thus making it unreasonable *not* to infer, indeed conclude, that the bank participated in the churning. The fact that the bank failed to pass on the trade paperwork to Pyramid's accountants as was the normal procedure, and the fact that the bank did not charge its usual activity fee for the trades, are but further evidence of the bank's active participation in a scheme it intended to keep covered-up from its inception.

Second, where the court did not like the evidence or the inferences to be drawn therefrom, it created its own. For example, while explicitly acknowledging that the recordkeeping and testimony of the bank's officers could suggest a possible entanglement with Pearson that the officer wished to cover-up — precisely Pyramid's allegation — the court nonetheless devised its own inference, suggesting that any such "mendacious concealment, if it occurred, is also consistent with the misbegotten effort to conceal negligence by the bank." *Pyramid*, 924 F.2d at 1117 (App. 5a). Weighing these inferences and resolving the conflict between them in favor of the bank, the court concluded that the inference of a cover-up was "a stretch." *Id.* at 1117 (App. 5a). The circuit court went on to erroneously reject Pyramid's evidence of post-churning racketeering activity. In dismissing this concealment, the court narrowed the scope of the RICO allegations, taking them out of this Court's interpretation of the extent of wrongdoing necessary to conform to *H.J., Inc.*

6. In drawing inferences as they did, the district and circuit courts violated settled law. They cited no authority for the proposition that all inferences are to be drawn in favor of the movant, as they did; they misapplied precedent; and, in so doing, they have sharply curtailed the compensatory and deterrent purposes of RICO.

7. That Federal courts in the District of Columbia appear to be altering settled law on how summary judgment is to be applied may stem from a growing and continuing tendency to misinterpret this Court's holdings in *Anderson* and *Matsushita*. *Matsushita*, for example, has been interpreted as permitting any substantive law to limit the "range of permissible inferences" which might be drawn from the underlying evidence. *Halperin v. Kissinger*, 723 F. Supp. 1535, 1544 (D.D.C. 1989) (citing *Matsushita)*. The trend appears to be to interpret *Matsushita* as a mandate to prohibit the drawing of any inference which is, in the opinion of the court, outweighed by any other inference, without favor to the non-moving party. This is not what *Matsushita* holds. *Matsushita* simply states that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 558 (emphasis added). Given that inferences to be drawn must be viewed in the light most favorable to the party opposing the motion, this Court could not have meant for *Matsushita* to be interpreted in such a broad fashion.

8. The holdings relating to summary judgment in *Matsushita* and *Anderson* can be strictly limited to the antitrust and defamation/libel contexts in which they arose, and the Court should restrict their applicability to like cases. A distinction should be made for not limiting the drawing of inferences in certain circumstances, such as RICO, while limiting them in the context of antitrust and defamation: where inferences to be drawn contribute to effectuate the purpose of a statute, there should be an even greater presumption that these inferences should reach the jury. Evidence and inferences should not be eviscerated by the trial judge through summary judgment if so doing thwarts the purpose of the statute.

This was recognized, in part, by the Court in *Matsushita*. There, and in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (a previous antitrust case), the Court specifically acknowledged that the trier of fact was to limit implausible inferences where those inferences were directly contrary to activities protected by statute. Thus,

> [c]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, *because the effect of such practices [drawing inferences regarding conspiracy] is often to deter procompetitive conduct* [*i.e.* conduct protected by the statute].

Matsushita, 475 U.S. at 593 (emphasis added).

Similarly,

> Mistaken inferences . . . [going to the jury] . . . in cases such as this one are especially costly because they chill the very conduct the antitrust laws are designed to protect [competition].

Matsushita, 475 U.S. at 594.

In the RICO context, however, and specifically in the *Pyramid* case, the inferences which should have been drawn in favor of the nonmovant would have bolstered enforcement of the statutes in question. There would be no chilling effect on protected or beneficial conduct. Rather, these inferences, had they reached a jury, would tend to eliminate or dissuade conduct proscribed by statute. *Not allowing* inferences to go to the jury in this context tends to enhance the possibility that proscribed activities will continue - the very circumstance the *Matsushita* Court sought to avoid.

9. Because of: a) the distinctions which should be drawn between the antitrust and RICO contexts; b) the apparent misapplication of summary judgment standards by the federal courts in the District of Columbia; and c) this Court's willingness to set the standards in the context of antitrust, it is entirely appropriate for the Court now to clarify what the proper standards are in ruling on motion for summary judgment in the RICO context.

10. Use of summary judgment as implemented by the courts below cuts against the stated purpose of RICO. Plaintiffs, who have a difficult burden under RICO as it currently exists, will be further hampered in presenting their cases to a jury by the additional hurdles now imposed upon them by the methods of analysis employed in the pending case. Addressing a similar RICO concern, this Court,

in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985), negated a judicially imposed prior-conviction requirement, noting that "[s]uch a rule would severely handicap potential plaintiffs." So does misapplication of summary judgment standards.

This Court has recognized that RICO is "to be read broadly." *Id.* at 497. Indeed, the Court has deferred to Congress' "self-consciously expansive language . . . [and] . . . it's express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes' " *Id.* at 498 (quoting Pub. L 91-452, § 904(a), 84 Stat. 947). And, "[f]ar from effectuating these purposes, the narrow readings [offered below] would in effect eliminate § 1964(c) from the statute." *Id.* Further, RICO is an "aggressive initiative," "a major new tool" and "it is in this spirit that all of the Act's provisions should be read." *Id.*

In order for RICO to be broadly remedial, for the purposes of RICO to be effectuated, and for RICO to continue to be an aggressive initiative and major tool, the Court should now define the summary judgment guidelines to be applied to RICO. Specifically, it should admonish trial judges to allow justifiable inferences to be drawn on behalf of the party seeking to enforce the terms of the statute. Only by so doing will the Court preempt the judicial neutering of this statute.

Use of artfully crafted standards on summary judgment is essential to protect the purpose of RICO. Meat-axe applications of summary judgment standards cannot be allowed to gut the usefulness of RICO and render RICO claims little more than an exercise in summary judgment motions practice.

11. Compounding the circuit court's narrowing of RICO by failing to draw the proper inferences and resolving factual differences in favor of Pyramid is its misplaced reliance on this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1957).

Pyramid alleged and submitted evidence of racketeering occurring between 1981 and 1985. That misconduct was designed to churn Pyramid's portfolio and conceal the racketeering to preserve the opportunity for future churning. In considering the evidence the court

again impermissibly drew all relevant inferences in favor of IBR, thereby limiting Pyramid's claims. It discounted over three years of racketeering because, in its view, post-churning misconduct did not, as a matter of law, further the criminal conspiracy.

Grunewald, a criminal case, was decided on policy considerations relating to the statute of limitations. There, the Government argued that the statute of limitations defense raised to bar prosecution of the underlying case was inapplicable, alternatively arguing that, first, overt acts of concealment extend conspiracies even after the main conspiracy objective was met; and second, that the main objective of the underlying conspiracy was broader in temporal scope than claimed by the accused. *Id.* at 398-99.

In rejecting the first argument, the Court ruled only that passive acts of concealment designed to "cover the tracks" of the wrongdoer would not be allowed to indefinitely extend the statute of limitations for a conspiracy. It obviously did not rule — because RICO was not yet in existence — that fraudulent acts of concealment cannot be part of, or establish, a pattern of racketeering which furthers the main criminal conspiracy.[3] Indeed, in accepting the government's second argument, the *Grunewald* Court recognized that it is a question of fact for the jury to determine the extent of the main objective of the criminal conspircy. *Id.* at 408-10. Only after that determination is made is it appropriate to determine the last act of racketeering for the purposes of making any temporal judgments.

Here, the acts of concealment furthered the main criminal objective: to ensure that the racketeers could preserve future opportunities to defraud. The court below ignored this fact, and in so do-

[3]Moreover, application of *Grunewald* to RICO would restrict the statute's broad remedial purpose by limiting conduct which otherwise would satisfy the "continuity" prong of the pattern element. Of even greater concern is that such application would effectively encourage racketeers to engage in future misconduct to conceal their past criminal conduct, since the subsequent misconduct could not trigger RICO liability. This result hardly comports with the broad remedial purpose envisioned by Congress and acknowledged by the Supreme Court.

ing, rejected relevant law in its Circuit. Concealment to promote the criminal objectives of a conspiracy may be considered "in furtherance of the conspiracy." *United States v. Perholtz*, 842 F.2d 343, 356-57 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 821 (1988).[4]

Perholtz is far more applicable to the present case than *Grunewald*. Indeed, *Perholtz* involved a RICO prosecution in which the court noted that "Congress has instructed us to construe RICO 'liberally to effectuate its remedial purposes.' " *Id.* at 353. The court recognized that acts of concealment were "parts of continuing activity that was essential to and in furtherance of the survival of an ongoing operation." *Id.* at 357. The facts here meet this standard. The continuing post-churning misconduct sought to deceive Pyramid as to the nature of the racketeering so that it would remain a loyal customer whose portfolio WIBT and others could continue to manipulate. Such deception was critical to ensure the success of the fraudulent scheme.

The court below, however, erroneously either rejected or ignored evidence of this concealment and the fact that the concealment involved RICO predicate acts. For example, when considering a WIBT letter written after the churning, the court concluded that there was "no evidence that the March 3, 1982 letter could have been intended to advance a fraudulent scheme by lulling Pyramid into some false assumption." *Pyramid*, 924 F.2d at 1118 (App. 7a). That letter, however, falsely advised Pyramid that WIBT had no trading statements from Hutton during the period of churning.

This deception was critical in order to further the fraudulent scheme, because WIBT had previously advised Pyramid that it had received no trading statements, confirmation slips, trade telexes or other communication suggesting trading activity. Following the churning WIBT was obviously sensitive to Pyramid's demands for explanation. As the record reflects, the letter was sent in response to, not in anticipation of, Pyramid's inquiries. WIBT's going through

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[4]*See also United States v. Haldeman*, 559 F.2d 31, 110-11 (D.C. Cir. 1976); *United States v. North*, 708 F.Supp. 375, 377 (D.D.C. 1988).

the motions of purporting to help Pyramid find out what had happened by providing the letter to Pyramid was but further effort to lull Pyramid into the false belief that the bank had never received notice of churning. In writing to Hutton asking for statements, and thus suggesting that, from whatever source, it had no knowledge of the wrongful trading, WIBT lied, and therefore fraudulently concealed its involvement. If it had no notice, it surely could not have been a party to churning, or so WIBT hoped Pyramid would believe.

Rather than properly infer that the letter was designed to conceal, the circuit court assumed in a conclusory fashion that "the natural explanation for the letter is bank sloppiness, not conspiracy." *Id.* at 1118 (App. 8a). This conclusion simply cannot be reconciled with the fact that the letter was given to Pyramid at the very time WIBT officers were continually advising that WIBT had no notice of churning, a fact later dispelled by the bank's ledger.[5]

In addition, the court below drew a critical inference in favor of IBR regarding the post-churning testimony of WIBT officers. Those officers testified that the bank received no notice of the churning. In view of Pyramid's constant demands for explanation, the later discovered numerous ledger entries evidencing hundreds of illegal trades, and the fact that WIBT officers had to approve each trade, it is inconceivable that the court could conclude that the appearance of such "mendacious concealment" is "also consistent with a misbegotten effort to conceal negligence by the bank." *Id.* at 1117 (App. 5a). Indeed, the court expressly notes that two inferences may be drawn from this evidence, yet it impermissibly drew the inference favoring IBR. This inappropriate review of the evidence

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[5]It is more plausible to infer that the letter was used to deceive Pyramid. If this were mere sloppiness, then WIBT was not only sloppy each and every time a trade confirmation slip arrived (hundreds of times over a three-month period), but was sloppy when it failed to note the lack of a monthly statement each and every month from June 1981 to March 1982. The bank, not a charitable organization, must also have been sloppy each time it failed to record its regular fee for each of the hundreds of transactions. On this record, it is reasonable to assume that WIBT operated from a basis other than mere neglect.

underscores the circuit court's erroneous treatment of both summary judgment and RICO.

12. In addition to misapplying summary judgment standards, the district and circuit courts erred in their analysis of the threat of prospective racketeering element of Pyramid's RICO claim. Specifically, the circuit court's ruling that three months of systematic and continuous racketeering does not satisfy the "continuity" prong of the RICO pattern element conflicts with both its own precedent and that of this Court. Moreover, it effectively legitimizes efforts by racketeers to escape RICO liability. And, while the circuit court "assumed that Washington International engaged in some acts of racketeering" *Id.* at 1117 (App. 5a), it nevertheless erroneously limited the scope of that racketeering by discounting numerous acts of misconduct transpiring over a three-year period, although it reasonably could be inferred that these acts were calculated to conceal the conspirators and their scheme in order to continue, and facilitate future, securities manipulation.

This Court's direction that RICO should be liberally construed to effectuate its remedial purpose facilitates the compensatory and deterrent goals of the statute. Consistent with this interpretation, this Court held in *H.J., Inc.*, that the threat of prospective racketeering activity satisfies the [RICO] continuity requirement. This "threat," or an "open-ended" pattern of racketeering, can be established by evidence of past conduct that by its nature projects into the future with a threat of repetition.[6]

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[6]In *H.J., Inc.*, this Court recognized that racketeering can be interrupted prior to its objectives having been met, making it impossible for a plaintiff to demonstrate continuity over a substantial period of time. The Court also recognized that liability for racketeering should not be foreclosed when that misconduct is discovered after it has occurred for only a short period of time, or before all of the objectives of the scheme have been accomplished. "In such cases, liability depends on whether the ***threat*** of continuity is demonstrated." *H.J. Inc.*, 57 U.S.L.W. at 4954. The Court added that "the development of these concepts must await future cases," and it noted that "a threat of continuity of racketeering activity might be established at trial." *Id.* at 4954. The determination of whether a "threat" exists

Following *H.J., Inc.* the District of Columbia Circuit applied the "open-ended" test in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132 (D.C. Cir. 1989). The circuit court applied the *H.J., Inc.* "threat" standard, finding that four predicate acts committed during a four-day labor strike constituted an "open-ended" pattern of racketeering activity, either explicit or implicit.'" *Id.* at 145 (quoting *H.J., Inc.*). This finding was made despite any assurance of future racketeering. Moreover, the court did not limit its finding based on temporal considerations or by the quality of the predicate acts.

Here, Pyramid submitted evidence of predicate acts extending over a substantially longer period of time, and presenting an opportunity for future racketeering just as threatening as that involved in *Yellow Bus*. Pyramid intended to convert its portfolio to long-term investments. This conversion, coupled with ongoing misconduct of WIBT and Hutton, provided a threat of future racketeering satisfying *H.J., Inc.* and *Yellow Bus*. At a minimum, the evidence raised a factual issue as to whether the racketeering created a "threat" of prospective racketeering activity.

The courts below again drew inferences of fact against Pyramid with respect to the threat of future racketeering. For example, while noting that someone at WIBT was aware of the illegal trading, *Pyramid*, 924 F.2d at 1118 (App. 7a), the court some how concluded that only Hutton's broker actively participated in the churning. Uncontroverted evidence, however, established that WIBT was not only aware of the trading, but of Pyramid's order to halt trading. As procedures between Pyramid and WIBT required the bank's officers to approve all trades before execution and recordation, it is unreasonable *not* to infer that WIBT participated in the churning.

Furthermore, the courts below found that no threat of continued

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is a question left to the trier of fact, and this language cautions that trial courts must make certain that a RICO claim not be rejected on a "pattern" challenge unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 4956.

criminal activity could have existed beyond the time Pyramid's President and sole shareholder, Attridge, returned from his honeymoon in Hawaii. *Pyramid*, 924 F.2d at 1119-1120 (App. 10a-11a). The court erroneously inferred that only Attridge's absence from the Cayman Islands provided the opportunity for wrongdoing. Yet Pearson was located in West Palm Beach, Florida, and Attridge did not live at the bank. Simply because the racketeers were willing to churn Pyramid's portfolio while Attridge was in Hawaii, there is no reason to infer that they would be unwilling to churn while he was in the Cayman Islands; indeed it was patently unreasonable for the court to have created such an inference. Agan, the court drew inferences against Pyramid. Additionally, the court failed to infer that the systematic misconduct of WIBT, over three years, presented ample evidence from which a reasonable jury could conclude that a threat of future racketeering existed.

In short, the lower courts impermissibly drew inferences of fact against Pyramid, or failed to consider evidence from which a threat of future racketeering could reasonably be inferred. Moreover, it made no attempt to distinguish *Yellow Bus*, where a pattern of racketeering was established with evidence far less compelling than present here. The District of Columbia Circuit has created inconsistent standards governing RICO claims. This matter deserves reconciliation and clarification.

13. The circuit court was also internally inconsistent in how it applied some of the inferences it created. The most glaring and egregious example concerns its dismissal of Pyramid's state-law claims on the grounds of the statute of limitations. As noted above, the circuit court denied that WIBT had engaged in a pattern of racketeering, volunteering that "any such mendacious concealment if it occurred, is also consistent with a misbegotten effort to conceal negligence by the bank." *Pyramid*, 924 F.2d at 1117 (App. 5a). Ignoring for the moment that "if it occurred" is a genuine issue for jury resolution and not appellate speculation, that inference was somehow abandoned by the circuit court when it dismissed Pyramid's negligence claim.

Even were it proper for an appellate court to weigh inferences against a non-moving party, surely in the interest of fundamental fairness it must be done consistently. Having made a choice between competing inferences, whether based on the underlying facts or simply created, the circuit court must accept that choice for its analysis of each aspect of the case. If, in the eyes of the court, WIBT's actions were deemed insufficiently purposeful to rise to the level of a pattern of racketeering because they were done merely to conceal negligence, then this "fact" of concealing negligence must also apply to an analysis of the statute of limitations. And WIBT's concealment actions, even if done only to conceal negligence, are critical to an analysis of the statute of limitations, for if there was concealment the statute of limitations must be tolled.

14. The circuit court, however, erred in not applying the doctrine of fraudulent concealment to the state law claims. The court ruled that the three-year statutes of limitations ran against Pyramid's common-law claims, because the lawsuit was filed approximately six weeks beyond the third anniversary on which the court concluded Pyramid knew of its claim. *Pyramid*, 924 F.2d at 1122-1124 (App. 16a-19a). That knowledge was obtained in November, 1984 when Pyramid allegedly received a ledger indicating that certain trades had been recorded. However, other evidence refutes this and reveals that the court's analysis was flawed.

Under the doctrine of fraudulent concealment the statute of limitations is tolled, and defendants must meet a more stringent standard, something closer to "actual notice", to bar plaintiff on the ground that he was on notice of his claim. *Riddell*, 866 F.2d at 1491. The lower courts did not apply this standard, and apparently ignored evidence that defendants continued to conceal their misconduct at the very time the ledger purportedly was received.

The record demonstrated that at the time Pyramid allegedly obtained the ledger (November 1984), WIBT officers were testifying that the bank had no notice of trading. These same fiduciaries had continually assured Pyramid over the prior three years that they were wholly unaware of trading. That later proved false. Thus, even

assuming that the ledger had been produced in 1984, the cumulative deception by WIBT, coupled with false deposition testimony at the same time the ledger purportedly was obtained, perpetuated the concealment. As the circuit court recognized in *Riddell*, such concealment hides true facts because it "obscures the significance of such information as it comes to plaintiff's attention." *Id.* at 1491. Both lower courts failed, however, to consider the concealing effect of the November, 1984 WIBT testimony, and thus misapplied the fraudulent concealment doctrine.[7]

Moreover, receipt of the ledger provides no more than evidence that trading had been recorded. The ledger consists merely of accounting sheets, and contains no reference to WIBT. Indeed, it was not until 1989 that plaintiff established that the ledger was WIBT's. Thus, mere receipt of the document in 1984 would hardly provide plaintiff "notice sufficient as a matter of law to require him to file this suit." *Id.* at 1494. The court's analysis provides plaintiff with no time to analyze the ledger and compare it with trading statements, confirmation slips and telexes to establish its relation to the unauthorized trading. Rather the court ruled that as a matter of law, Pyramid fully knew of its claims against WIBT the moment it allegedly received the ledger. However, as the circuit court stated in *Riddell*, "what a plaintiff knew and when he knew it, in the context of a statute of limitations defense, are questions of fact for the jury." *Id.* at 1484.

Significantly, on December 29, 1988, the district court acknowledged that there appeared to be genuine issues of material fact precluding the grant of summary judgment, and Pyramid took no additional discovery on this issue. Although IBR did not reargue the limitations issue, or present any further evidence, the district court inexplicably reversed its decision on December 19, 1989, and

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[7]Further, as this Circuit has recognized, acquisition of incriminating information does not commence the limitations period when defendant engages in ongoing concealment. *International Ladies' Garment Workers Union v. N.L.R.B.*, 463 F.2d 907 (D.C. Cir. 1972); *Richards v. Mileski*, 662 F.2d 65.(D.C. Cir. 1981).

granted summary judgment, holding that the state law claims were untimely by six weeks.

The necessary implication of the courts' ruling is that when the plaintiff has *any* evidence relating to wrongdoing, despite acts of deception and concealment by a fiduciary, the statute of limitations begins to run. The statute of limitations was not designed to be used as a sword in this manner, since "the concealing defendant lacks the equity to command easier access to the defense." *Id.* at 1491. The courts put misplaced emphasis on what was said to have occurred in November, 1984, and ignored what the preponderance of evidence indicated did in fact occur.

While a court has a legitimate reason to be concerned that litigants do not engage in opportunism in advancing their cases, it is the function of a jury to determine which facts and evidence are to be believed, and whether a litigant has presented enough evidence to meet its burden of proof. Rather than missapplying standards so as not to "imperil summary judgment", lower courts should be guided to protect Seventh Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

MICHAEL J. McMANUS
(Counsel of Record)
WARREN LUTZ
MICHAEL S. LEVINE
JACKSON & CAMPBELL, P.C.
Suite 300 South
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Attorneys for Petitioner

June 24, 1991

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 29, 1990 Decided February 1, 1991

No. 90-7010

PYRAMID SECURITIES LIMITED, APPELLANT

v.

IB RESOLUTION, INC.

Appeal from the United States District Court
for the District of Columbia Circuit

(Civil Action No. 87-03541)

Michael J. McManus, with whom *Warren Lutz* and *Michael S. Levine* were on the brief for appellant.

Sheila J. Carpenter, with whom *Bruce R. Hegyi* and *Robert A. Spencer* were on the brief for appellee.

Before: BUCKLEY, WILLIAMS and THOMAS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: Pyramid Securities Ltd.

brought suit in district court against International Bank, claiming that it was liable under RICO, the Racketeer Influenced and Corrupt Organizations statutes, 18 U.S.C. §§ 1961, 1962(c), (d),[1] and under the common law, for acts allegedly performed by its Cayman Islands subsidiary, Washington International Bank and Trust, Ltd. The district court granted summary judgment for the defendant, finding that the alleged acts did not satisfy RICO's requirement of a "pattern" of racketeering activities and that the statute of limitations had run on the common law claims. IB Resolution, Inc., successor of International Bank by merger, has been substituted as defendant in this court. We affirm.

I

Edward Attridge, a resident of the Cayman Islands, created Pyramid as a vehicle for handling his investments in securities and commodities. He is its president and sole owner. In 1980 he hired Washington International to perform bookkeeping and "clearinghouse" functions for Pyramid. The bookkeeping duties were assumed by Pyramid's accountants in the fall of 1980, but Washington International continued with the clearinghouse function — balancing Pyramid's accounts with various brokerage firms by paying sums due for purchases and receiving sums due as a result of sales. For these services Washington International received a fee of 1/4 of 1%. Nicholas Duggan, Washington International's President and at the time Attridge's personal friend, oversaw the bank's performance of its work for Pyramid.

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[1]Section 1962(c) reads: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Section 1962(d) reads: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

In September 1980 Pyramid started using the brokerage services of one Linda Pearson and her employer, originally PaineWebber and later E.F. Hutton. Attridge evidently chose Pearson on the basis of statements by a Washington International employee that she offered a good discount and was used by some of the bank's other customers. Pearson traded on Pyramid's behalf through late August 1981, when Attridge decided that Pyramid would in the future pursue only low-risk, long-term investments, and directed her to stop her trading activities. A few days later, he flew to Hawaii to be married and to take a long honeymoon. Pearson came to the wedding, remained in Hawaii for about a week, and then returned. Attridge told her when he would get back to the Cayman Islands — late November.

The cat being away, Pearson could play. On her return from Hawaii she began "churning" the account — i.e., making a series of unauthorized trades that generated commissions for her — and thereby severely reduced the account's value. Although Pyramid's British Virgin Islands office evidently received confirmation slips for the trades, Attridge did not personally discover the churning until he returned from his honeymoon.

Pyramid sued Pearson and Hutton, but settled the suit in December 1985.[2] Throughout the Pyramid-Hutton litigation, Washington International employees testified that they were unaware of the September-November 1981 trades. It later became apparent, however, that at least a scrivener at the bank was aware of them, for in due course the parties discovered a record of them in a bank ledger book, which Pyramid has since branded the "secret ledger".

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[2]The settlement was for $850,000 (before deduction for attorneys' fees and other expenses), and IB suggests that this wipes out any common law claim, as the Hutton recovery would be credited against Pyramid's damages. But the possibility of punitive damages draws this theory in question, and the point makes no difference in view of our disposition of the case.

On December 31, 1987, Pyramid filed its complaint in the present litigation, suing International Bank for alleged wrongdoing by its subsidiary, Washington International. (We assume the validity of piercing the corporate veil; the issue was raised before the district court but not decided by it or briefed by the parties here.) Pyramid alleged that Washington International's involvement constituted complicity in the churning scheme and amounted to a "pattern of racketeering" under RICO that entitled Pyramid to treble damages. Pyramid also asserted related common law claims, including fraud, negligence, civil conspiracy, breach of contract, and breach of fiduciary duty.

After considerable discovery the defendant filed a motion to dismiss the complaint, which the court treated as one for summary judgment. See Fed. R. Civ. P. 56(c). The court granted the motion, finding that there was an insufficient "pattern" to sustain the RICO claims. Although finding no diversity of citizenship, it went on to treat the state law claims and found them time-barred.

II

As the court granted summary judgment, we must decide whether a jury could reasonably have found for Pyramid on the record before the district court; although we must resolve all serious conflicts of evidence in Pyramid's favor, a mere scintilla in its favor is not enough to defeat the motion. See *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1484-85 (D.C. Cir. 1989). We start with the RICO claims.

A violation of RICO § 1962(c) consists of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted). Pyramid argues that International Bank (through its subsidiary Washington International), Duggan, Pearson, and Hutton had formed an enterprise (or "association-in-fact") for the legitimate trading of securities long before the events at issue in this case, and that this enterprise conducted "racketeering

activity" in the form of securities fraud, mail fraud, wire fraud, and obstruction of justice.

As the district court threw out the RICO claims only for want of a *pattern* of racketeering, we assume that Washington International engaged in some acts of racketeering. The assumption is something of a strain, in view of the tenuous character of Pyramid's evidence. Granted, the testimony of Washington International employees that they did not receive records of the churning while it took place raises a question as to who kept the "secret ledger". If it was one of those witnesses, or if one of them knew of the record-keeping while it was going on, that witness obviously lied, suggesting a possible entanglement with Pearson that he or she wished to cover up. But any such mendacious concealment, if it occurred, is also consistent with a misbegotten effort to conceal negligence by the bank. The inference that Washington International bungled its handling of Pyramid *on purpose* appears a stretch — especially as nothing in the record suggests that it could have expected to profit from the churning; it could hardly have expected to collect a fee for any clearinghouse work performed in violation of Attridge's instructions, and in fact there is no claim that Pearson's churning presented any occasion for the sort of services it formerly provided.[3] In any event, we agree with the district court that any racketeering did not amount to a pattern.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), the Supreme Court set out limits on what could constitute a RICO pattern. Apart from the minimum of two predicate acts required by RICO's text, the plaintiff or prosecutor "must show that the racketeering predicates are related, *and that they amount to or pose a*

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[3]Pyramid may have raised its awkward RICO claims because Hutton has (arguably) already compensated it for most or all of its losses (see note 2 above). Under RICO it appears that the proceeds of prior judgments are set off against a recovery only *after* the trebling of damages. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987).

threat of continued criminal activity." 109 S. Ct. at 2900 (emphasis added).

In turn, the plaintiff can satisfy the "continuity" requirement by showing either a "closed period of repeated conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 2902. Pyramid invokes both.

A. *A "closed-ended" period.*

Where there is no threat of further racketeering, *H.J.* states that "acts extending over a few weeks or months" are not enough. 109 S. Ct. at 2902. Here the securities fraud lasted three months, from early September to late November 1981. Similarly, assuming that a conspiracy to violate securities fraud laws is also a predicate offense under RICO, see *United States v. Weisman*, 624 F.2d 1118, 1123-24 (2d Cir. 1980), any such conspiracy ended with the abandonment of the churning when Attridge returned to the Cayman Islands.

Pyramid apparently argues that Washington International extended the "conspiracy" through 1984 or 1985 by "concealing" its knowledge of (and alleged participation in) the churning. But the Supreme Court held long ago that a conspiracy generally ends when the design to commit substantive misconduct ends; it does not continue beyond that point "merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." *Grunewald v. United States*, 353 U.S. 391, 405 (1957). After-the-fact concealment "indicate[s] nothing more than that the conspirators do not wish to be apprehended — a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord." *Id.* at 406.

While *Grunewald* holds open the possibility that concealment could extend a conspiracy if the conspirators expressly plotted it in advance of the substantive crimes, it imposes an almost insurmountable evidentiary hurdle

— "direct evidence [of] an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." *Id.* at 404; see also W. LaFave & A. Scott, Criminal Law § 6.5, at 557 (2d ed. 1986) (proof "virtually impossible"). Pyramid has produced nothing resembling such evidence.

Pyramid also suggests that Washington International's alleged "concealment" itself involved RICO predicate acts besides conspiracy to commit securities fraud. But it points to no such act. Thus the theory provides Pyramid no real help, even assuming that concealment activities that cannot extend the duration of a conspiracy under *Grunewald* might nonetheless do so for a racketeering "pattern" under RICO.

Specifically, Pyramid argues that Washington International committed mail fraud (a RICO predicate act, see 18 U.S.C. § 1961(1)(B)) on March 3, 1982 when it sent Pearson a letter asking her for copies of "statements of the [Pyramid] account" and said it had not received any since June 30, 1981. See J.A. 662. Since Washington International obviously could not have meant to defraud Pearson, Pyramid ventures the suggestion that it sent the letter solely so that it could later give Pyramid a copy (as it later did, in response to a request from Attridge), thereby feigning innocence.

This claim is enormously creative. First, Pyramid's smoking gun — Washington International's "secret" ledger book — proves that someone at Washington International had received notice of the churning (perhaps in the form of confirmation slips), *not* that it had received "statements" of the Pyramid account, a phrase presumably referring to brokers' conventional monthly statements. Pyramid has offered not a shred of evidence that the bank had received such statements, and thus no evidence that the March 3, 1982 letter could have been intended to advance a fraudulent scheme by lulling Pyramid into some false assumption. Second, even if the bank

had received Pyramid's account statements, the natural explanation for the letter is bank sloppiness, not conspiracy. To suggest that Washington International wrote the letter in anticipation of Pyramid's later request, and thus the chance to fool Pyramid, smacks of the paranoid. Finally, we note that the letter was sent within six months of the start of the churning; that may or may not be enough to overcome *H.J.*'s statement rejecting "acts extending over a few weeks or months".[4] See 109 S. Ct. at 2902.

Pyramid further argues that Washington International committed mail fraud on October 21, 1983, when at Pyramid's request it mailed Pyramid copies of the bank's correspondence with Hutton, which Pyramid needed to pursue its Hutton litigation. Again Pyramid shows neither the falsity of the letters nor any other way in which the bank's response to Pyramid could plausibly be viewed as advancing a scheme to defraud. In any event, because the letter gives every evidence of having travelled only within the Cayman Islands, as Pyramid appears to concede, Appellant's Reply Br. 3 n.3, it does not satisfy § 1341's requirement of use of the US mails. See, e.g., *U.S. v. Dray*, 901 F.2d 1132, 1135 (1st Cir. 1990); *U.S. v. Wosepka*, 757 F.2d 1006, 1010 (9th Cir. 1985).

Pyramid also charges that throughout its Hutton litigation, Washington International employees, including Duggan, lied in depositions about their first-hand knowledge of the churning. As perjury is not a predicate offense under RICO, see, e.g., *U.S. v. Williams*, 874 F.2d 968, 973

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[4]When Attridge returned from his honeymoon, he had several conversations with an unidentified Washington International employee who said that the bank did not have "any" documents from Hutton (apparently referring to ones that would have evidenced the churning). J.A. 722-23. Pyramid claims that Washington International thereby violated the wire fraud statute. See 18 U.S.C. §§ 1343, 1961(B). As the alleged conversation occurred soon after Attridge's return, it would not extend the pattern of substantive crimes significantly beyond the original three months of churning.

n.17 (5th Cir. 1989), Pyramid argues that these statements, assuming them to be lies, constituted obstruction of justice by Washington International in violation of 18 U.S.C. § 1503. See also 18 U.S.C. § 1961(1)(B).

Pyramid merely cites § 1503, as though the bank employees' testimony were self-evidently a violation — and one by Washington International. Presumably Pyramid refers to the section's prohibition of attempts "to influence, obstruct, or impede, the due administration of justice". To constitute such a violation, the defendant must have acted with the "specific intent to impede the administration of justice", *Williams*, 874 F.2d at 980; see also *Melton v. City of Oklahoma*, 879 F.2d 706, 732 (10th Cir.), reh'g en banc granted on unrelated issues, 888 F.2d 724 (1989); *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984), and there must have been "a pending judicial proceeding [which the defendant] knew of and sought to influence, impede, or obstruct". *United States v. Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986), modified on rehearing in other respects, 817 F.2d 947 (2d Cir. 1987) (en banc); see also *United States v. Smith*, 729 F. Supp. 1380, 1383 (D.D.C. 1990) (citing cases).

It is hard to imagine that Washington International had the specific intent of obstructing justice in the only judicial proceeding "pending" at the time, the Pyramid-Hutton litigation, and Pyramid has not even made such a claim. Even if the employees' statements were conscious lies that could be imputed to Washington International, they could at most manifest a "specific intent" to prevent the birth of a possible future lawsuit against the bank. Accordingly, the § 1503 claim must fail.[5]

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[5]Pyramid also claims that there was something fraudulent about Washington International's failure, during the churning period, to charge commissions and produce standard trading documents. As the bank had no basis for charging commissions in the churning period, in light of the understanding with Attridge, we cannot see how its not doing so could prove anything. In any event, omissions during the too-short churning period cannot extend it.

Finally, again on the premise that conspiracy to violate the securities fraud laws is a RICO predicate act, Pyramid may be invoking the doctrine that concealment activities can prolong a conspiracy if they make it easier to commit future substantive offenses or complete ongoing ones — as where kidnappers conceal their whereabouts while waiting for ransom. See *Grunewald*, 353 U.S. at 405. But as we develop below in consideration of the theory of an "open-ended" pattern, Pyramid has failed to support its claim that Washington International ever plotted to participate in any criminal activity other than the churning that ended in November 1981 (assuming it did even that).

2. *Open-ended theory of continuity.*

Pyramid argues that Washington International's activities posed a "threat of continued criminal activity." See *H.J.*, 109 S. Ct. at 2900. The Supreme Court has not defined the bounds of this "open-ended" pattern, but its illustrations indicate a requirement of far more than a hypothetical possibility of further predicate acts. One example is of a "hoodlum" who sells " 'insurance' to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the 'premium' that would continue their 'coverage.' " *Id.* at 2902. The others are of "a long-term association that exists for criminal purposes", and of cases where the predicate acts "are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.' " *Id.*

Pyramid suggests that Washington International entered into some sort of partnership with Hutton and Pearson to commit RICO acts as "a regular way of conducting [their] ongoing legitimate business." Its theory is that if Attridge had never discovered the churning, the bank would have continued to defraud both Pyramid — and others. But Pearson, the only person shown to have actively participated in the churning and apparently the only one with any financial incentive to do so, could not

have expected to continue manipulating Pyramid's account after Attridge returned from his honeymoon in November 1981. Attridge himself testified that before his wedding he checked Pyramid's portfolio on a daily basis. Indeed, immediately upon his return, he checked his account and found that things had gone awry. J.A. 457 ("[T]he assistant read off a list of stocks, and right away I knew that those were not my stocks."). Only the long honeymoon gave Pearson her opportunity. Nor is there any merit in Pyramid's effort to discern a conspiracy to defraud others in Attridge's testimony that he "[knew] of Mr. Duggan being aware that there was [sic] problems with Pearson with other customers of the bank". J.A. 500. Attridge offered no clue either as to how he had acquired this supposed knowledge about Duggan's state of mind nor the nature of the "problems with Pearson", which could mean almost anything. If threats as ephemeral as this could meet the continuity requirement, neither the concept of the closed period, nor indeed the Court's entire discussion in *H.J.*, could be taken to impose any minimum on the "pattern" required for RICO.

One more loose end: Pyramid asserts a violation of § 1962(d)'s prohibition of a conspiracy to violate § 1962(c). This claim falls with the § 1962(c) claim unless there is some evidence in the record that suggests a conspiracy to engage in racketeering acts that (but for detection) would have continued on after the churning scheme. As there is no such evidence, the claim must fail.

III

After dismissing the RICO claims, the district court found that there was no diversity of citizenship to support jurisdiction over the common law claims. Without mentioning the possibility of pendent jurisdiction, it nonetheless went on to the claims' merits and dismissed them as time-barred. We find diversity of citizenship. We then go on to address a defense contention that the district court left unresolved — whether Washington International was

a party required to be joined under Rule 19, Fed. R. Civ. P. We conclude it was not. Finally, on the merits we affirm the district court.

IB is incorporated in Arizona and has its principal place of business in the District of Columbia; it is thus a citizen of both for purposes of diversity. See 28 U.S.C. § 1332(c)(1). Because Pyramid is a citizen of neither, there is apparent diversity. Yet, relying on several decisions of the Fifth Circuit, see, e.g., *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 558 (5th Cir. 1985), the district court attributed a third citizenship to IB, the Cayman Islands citizenship of its subsidiary Washington International. The court argued that imputing a subsidiary's citizenship to its parent is proper where the latter is the "alter ego" of the former and, as in this case, "the parent corporation is being sued solely for the acts of its completely controlled subsidiary." J.A. 904.

We reject this analysis. In the reverse context, addressing efforts to attribute a parent's citizenship to its subsidiary, the courts have treated the two as separate entities. *U.S.I. Properties Corp. v. M.D. Construction Co.*, 860 F.2d 1, 7 (1st Cir. 1988); *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1142 (3d Cir. 1972). The statute suggests no attribution rule in either case. Nor are we persuaded by the district court's suggestion that because Pyramid's substantive claim involved piercing the corporate veil, consistency required the court to do so for purposes of determining diversity. In fact the district court's citizenship analysis is in some ways the reverse of veil-piercing, for it looks through the shareholder (parent corporation) and treats the corporation (subsidiary) as the controlling reality. Focusing on the subsidiary for jurisdictional purposes seems wholly anomalous where the substantive claim is about the parent and any remedy must come from the parent's pocket. That the parent's liability arises from acts of a subsidiary does not seem to weaken the traditional concern, however obsolete, that home-state prejudice might unfairly jeopardize the "foreign" party.

The defendant argued before the district court, and has preserved the argument before us, that Washington International was an indispensable party. As both Pyramid and Washington International are citizens of the Cayman Islands, that conclusion would have defeated diversity and required the court to dismiss the state law claims.

There are two oddities about this argument. First, Washington International may no longer exist as a discrete corporate entity. IB sold it during the course of the lawsuit and, according to Pyramid's papers before the district court, it was about to be merged into a new corporation. See J.A. 622; but see J.A. 848. Second, although IB asserts indispensability only as to the state law claims, where the upshot would be loss of jurisdiction, there appears no reason to think that Washington International would be any less indispensable as to the RICO claims. If we adopted IB's argument, we might have needed to remand the entire case to the district court — federal claims and all — for joinder of Washington International or its successor.

Luckily, Washington International is not indispensable at all. IB does not identify a single plausible way in which proceeding without Washington International would prejudice anyone or impinge on any of the concerns that are relevant under Rule 19. Instead, IB proposes a per se rule that a subsidiary is *always* an indispensable party in a suit against its parent if the subsidiary "is not just an important witness or source of evidence, but is in fact the primary participant in the actions complained of." Appellee's Br. at 39-40. IB makes no effort to connect this theory to the language of Rule 19. The only appellate opinion it cites for so broad a principle is *Freeman*, which similarly rested indispensability only on the "primary participant" theory, 754 F.2d at 559, with no review of Rule 19's checklist of possible risks of non-joinder.

Before the district court IB did mention two possible adverse effects of non-joinder. First, it argued that because Pyramid's allegations have jeopardized Washing-

ton International's reputation, the case "should be tried in the Cayman Islands where [Washington International] can clear its name." J.A. 329. The notion that parties must be joined merely because of the risk to their reputation is staggering. Without exploring its full implications, we simply note that it would scuttle the established principles that one joint tortfeasor is generally not an indispensable party in a lawsuit against another, see J.W. Moore, Moore's Federal Practice § 19.12, at 19-216 & n.20 (2d ed. 1985), and, more specifically, that agents are not indispensable parties in suits against the principal (at least where the principal was disclosed), *id.* at 19-219, citing *Milligan v. Anderson*, 522 F.2d 1202, 1204-05 (10th Cir. 1975).

IB also argued to the district court that non-joinder would enable Pyramid to bring a later, virtually identical suit against Washington International. Because IB signed an indemnity agreement with Washington International's purchaser, IB would have to pay both the costs of such a suit and any judgment levied against Washington International. Of course, this assurance that IB would bear the ultimate loss only replicates the outcome prevailing if Washington International had continued as IB's subsidiary — it would then have borne the loss as sole shareholder.

We examine the issue of prejudice to IB from the perspective of the parties at the outset of this suit — i.e., without glancing sidelong at the outcome on the merits. See *Tankersley v. Albright*, 514 F.2d 956, 965-66 & n.21 (7th Cir. 1975); but cf. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110-11 (1968) (appellate courts may sometimes take outcome on merits into account); *Bourdieu v. Pacific Oil Co.*, 299 U.S. 65, 71 (1936) (where complaint fails to state cause of action, consideration of parties' indispensability is "a vain waste of time"). Courts appear to have regarded the ex post analysis as suitable only where the party raises the issue for the first time after judgment. See, e.g., *Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1253-54 n.6 (8th Cir. 1978);

cf. *Compania Trasatlantica Espanola, S.A. v. Melendez Torres*, 358 F.2d 209, 214 (1st Cir. 1966). See generally C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1609 (2d ed. 1986). From an ex ante perspective, the possible injuries to IB from non-joinder fall into two categories, corresponding to the twin possibilities that IB would lose this lawsuit or win it.

First, IB might have feared that if it lost this suit it would ultimately have to pay two judgments on the same claim. But that result is inconsistent with the general common law principle (presumably applicable in the Cayman Islands) that a plaintiff can collect only once for a single injury. See Prosser & Keeton on Torts § 48, at 331 (5th lawyer's ed. 1984) ("When payment of the judgment in full is made by the judgment debtor, there is no doubt that the plaintiff is barred from a further action against another who is liable for the same damages. . . ."); 2 Restatement (2d) of Judgments § 50, at 40-47 (1982); 4 Restatement (2d) of Torts §§ 885-86, at 333-37 (1979); see also *FSLIC v. Reeves*, 816 F.2d 130, 135-37 (4th Cir. 1987).

Second, if IB won this suit, it would be exposed to the risk of paying for two defenses on the same claim, first here, then in a suit against Washington International. One answer lies in the possibility of defensive use of collateral estoppel, despite the want of "mutuality", though we do not know the status of that doctrine in the Cayman Islands. Compare *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); 1 Restatement (2d) of Judgments § 29, at 291-303 (1982). Further, it may well be that by the time IB raised the Rule 19 issue the statute of limitations had run in every jurisdiction where Pyramid could have reached Washington International. In any event, such risks of double *litigation* will be posed in any case where a party is liable both directly and indirectly — either as owner or indemnitor of a potential second defendant. Without more, they seem too remote to sustain IB's claim of indispensability. Compare J. Moore, § 19.07-2[1], at 19-140-42 & n.13 (noting that Rule 19(a) requires a "substantial risk of incur-

ring double, multiple, or otherwise inconsistent obligations" and that therefore "mere theoretical possibilities" of inconsistent obligations are not enough for indispensability under Rule 19(b)).

On the merits of the statute of limitations defense, the parties have agreed that a three-year statute governs, running (at the latest) from the time Pyramid should have known of the claims. See D.C. Code Ann. §§ 12-301(7) (for breach of contract); 12-301(8) (for breach of fiduciary duty, negligence, civil conspiracy, and fraud). Pyramid filed suit on December 31, 1987. Thus, the claims are barred if the district court was correct that a reasonable jury would necessarily find that Pyramid should have known of them by November 1984. We agree with the district court that the time has run.

The critical issue is when Pyramid received the ledger in which someone at Washington International hand-recorded the trades made in Pyramid's Hutton account in the autumn of 1981. It is undisputed that transfer of the ledger occurred in the context of Pyramid's suit against Hutton. Attridge himself has already taken an unequivocal position that his lawyer received the ledger in November 1984.

In a suit filed in Florida in 1987 by Pyramid, against the banks (Washington International and International Bank) and against the lawyers who represented Pyramid in its suit against Hutton, Pyramid claimed that its own lawyers mishandled the prior suit. Specifically, it claimed that Karen Gievers received the ledger in November 1984:

> On or about November 14, 1984, during the course of conducting discovery in preparation for the trial of PYRAMID's law suits, GIEVERS received from the BANK a secret securities ledger that revealed for the first time that ... the BANK had received on a timely basis notification of each and every unauthorized trade of PYRAMID's property. GIEVERS failed to recognize, appreciate and understand the significance of this secret securities ledger to the litigation entrusted to her care.

J.A. 365-66.

Contradictory pleadings do not usually create a judicial estoppel unless the party prevailed on the repudiated pleading. See *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547-48 (7th Cir. 1990). But Attridge backed Pyramid's pleading up with his own affidavit, signed June 29, 1987, swearing:

> It was from that securities mail register, which was first produced in November of *1984*, that I learned WASHINGTON had, in fact, received on a timely basis the confirmations or invoices for each of the unauthorized trades in and out of PYRAMID's account.

J.A. 104 (emphasis in original). The Florida pleadings do not make clear whether Attridge thought the date November 1984 helped his case because it was early (suggesting Gievers's sloth thereafter) or because it was late (emphasizing either the banks' concealment of the ledger or Gievers's sloth in securing it). But his underlining the year 1984 surely reflects intense focus on the issue. As Gievers was Pyramid's agent, her knowledge is imputed to Pyramid. Thus, if Attridge's sworn statement in the Florida lawsuit is accurate, Pyramid's state law claims here are barred.

Pyramid now claims that neither it nor its agents received the ledger until December 1985. In retrospect, Attridge wonders whether he had sufficient knowledge of the facts to make the sworn allegation found in his affidavit. But Attridge's expedient doubts about the veracity of his own past sworn statement do not raise a genuine issue of material fact. Where a party emphatically and wittingly swears to a fact, it bears a heavy burden — even in the summary judgment context — when it seeks to jettison its sworn statement.

Courts have long held that a party may not create a material issue of fact simply by contradicting its prior sworn testimony. See, e.g., *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975-76 (4th Cir. 1990); *Farrell v.*

Automobile Club of Michigan, 870 F.2d 1129, 1131-32 (6th Cir. 1989); *Adelman-Tremblay v. Jewel Companies, Inc.*, 859 F.2d 517, 520-21 (7th Cir. 1988); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988) (citing cases); *Van T. Junkins and Associates v. United States Industries*, 736 F.2d 656, 657 (11th Cir. 1984); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *Kizas v. Webster*, 492 F. Supp. 1135, 1147 n.42 (D.D.C. 1980) , *rev'd on other grounds*, 707 F.2d 524 (D.C. Cir. 1983). "[T]he objectives of summary judgment would be seriously impaired if the district court were not free to disregard [the later testimony]." *Martin*, 851 F.2d at 706. Some courts have extended the doctrine to cover even a non-party witness brought forward to advance the party's case, see, e.g., *Adelman-Tremblay*, 859 F.2d at 521, but where as here the affiant is the sole shareholder and president of the plaintiff corporation, we need not reach that extension. The upshot is that the prior sworn statement will receive controlling weight unless the shifting party can offer persuasive reasons for believing the supposed correction. E.g., *Farrell*, 870 F.2d at 1131-32.

Such reasons are more likely to be available where the initial statement took the form of a deposition rather than (as here) an affidavit. A deponent may have been confused about what was being asked or have lacked immediate access to material documents. See, e.g., *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986). As affidavits are prepared at the affiant's own initiative, these excuses are typically inapplicable. A party can also support repudiation of an earlier statement by offering newly discovered evidence. See, e.g., *Adelman-Tremblay*, 859 F.2d at 520.

In this case, Pyramid offers two points to support its repudiation, neither of which amounts to new evidence or materially undermines the original assertion. First, Pyramid observes that at a deposition in November 1984 Gievers stated that Washington International was withholding the ledger at the instruction of its lawyers. As

Attridge was present when Gievers made the statement, he obviously knew about it when he signed his affidavit two and a half years later. Besides, it is easily reconciled with Attridge's affidavit, as the bank could well have relented soon after.

Second, Pyramid points to an affidavit and deposition by Attridge — both made after International Bank had raised the statute of limitations defense — saying that his first exposure to the ledger came in December 1985, when (according to him) an embarrassed Duggan called him in at the tail end of a new deposition and conceded that the ledger contained damning evidence about Washington International. The new account, though vivid, does nothing to suggest any of the sort of new evidence, confusion, or lack of access to facts that have been taken to justify denying summary judgment on the basis of a repudiation. It certainly offers no reason to think Attridge's memories of his exchange with Duggan should now be sharper than when he filed the Florida affidavit in June 1987.

Moreover, Attridge's current account of Duggan's disclosure at the time of the December 1985 deposition with Duggan is in fact consistent with his earlier affidavit. That Duggan himself was either unaware of the ledger until December 1985, or slow to see its potential significance, does not imply that Pyramid had not received it before. In fact, Duggan's knowledge or anxiety that Pyramid's lawyers had copies of the ledger could have played a role in his readiness to come forward with it at the 1985 deposition.

If the issue were purely one of probabilities, Pyramid's evidence might be enough to sneak past summary judgment. But the cases resting summary judgment on sworn but repudiated party assertions reflect both a judicial insistence that parties proceed with real care in their supporting affidavits or testimony and a belief that parties' opportunism should not readily imperil summary judgment. We agree, and do not believe that Pyramid has undermined Attridge's 1987 affidavit enough to raise a

material issue on the date of Pyramid's notice of its potential claims.

As we agree with the district court that the facts cannot establish a pattern of racketeering for RICO purposes and that the state law claims are time barred, we affirm.

So ordered.

No. 90-7010

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1990
CA No. 87-3541

Filed Feb01 1991
Constance L. Dupre
Clerk

United States Court of Appeals For The District of Columbia Circuit

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Pyramid Securities Limited

Appellant

v.

IB Resolution, Inc.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BUCKLEY, WILLIAMS and THOMAS, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

Date: February 1, 1991
Opinion for the Court filed by Circuit Judge Williams

No. 90-7010

United States Court of Appeals
For the District of Columbia Circuit
September Term, 1990
CA No. 87-3541

Filed May01 1991
Constance L. Dupre
Clerk

AWARD OF COSTS

(As Taxed by the Clerk Pursuant
to Federal Rule of Appellate Procedure 39
and General Rule 15)

Costs are awarded as follows to appellee, IB Resolution,

And Taxed Against appellant, Pyramid Securities Limited.

Docket Fee:	$_____
Brief(s):	$ 156.00
Appendix:	$_____
TOTAL	$ 156.00

A true copy :
Test: Clerk
United States Court of
Appeals for the District of
Columbia Circuit

By: Elizabeth Brown
Deputy Clerk

Costs are payable directly between the parties. Payment should not be submitted to the Clerk.

No. 90-7010

United States Court of Appeals
For the District of Columbia Circuit
September Term, 1990
CA No. 87-3541

Filed MAR 25 1991
Constance L. Dupre
Clerk

United States Court of Appeals For The District of Columbia Circuit

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Pyramid Securities Limited

Appellant

v.

IB Resolution, Inc.

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: Robert A. Bonner
Deputy Clerk

Received March 28, 1991

No. 90-7010

United States Court of Appeals
For the District of Columbia Circuit
September Term, 1990
CA No. 87-3541

Filed MAR 25 1991
Constance L. Dupre
Clerk

United States Court of Appeals For The District of Columbia Circuit

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Pyramid Securities Limited

Appellant

v.

IB Resolution, Inc.

Before: Buckley, Williams and Thomas, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed March 4, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: Robert A. Bonner
Deputy Clerk

Received March 28, 1991

APPENDIX B

FILED
DEC 19 1989
JAMES E. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Civil Action No. 87-3541 (CRR)

Pyramid Securities Limited

Plaintiff,

v.

INTERNATIONAL BANK,

Defendant.

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

Appearances

For plaintiff: Michael J. McManus, Warren Lutz, and Michael S. Levine of Jackson & Campbell, P.C., Washington, D.C.

For defendant: Sheila J. Carpenter, Bruce R. Hegyi, and Robert A. Spencer of Sutherland, Asbill & Brennan, Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Civil Action No. 87-3541 (CRR)

PYRAMID SECURITIES LIMITED

Plaintiff,

v.

INTERNATIONAL BANK,

Defendant.

OPINION OF CHARLES R. RICHEY UNITED STATES DISTRICT JUDGE

Pyramid Securities Limited ("Pyramid") has sued International Bank ("International") for compensatory and punitive damages. Pyramid charges International with violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations ("RICO") statutes, 18 U.S.C. §§ 1962(c), (d) and also raises fraud, breach of contract, and other state law claims. International has filed a motion to dismiss, or in the alternative, for summary judgment. The Court will grant the defendant's motion for summary judgment because: (1) there is no genuine issue of material fact on the "pattern" element of Pyramid's RICO claim and (2) due to the lack of diversity between the parties, the Court does not have subject matter jurisdiction over Pyramid's remaining state law claims, which, in any event, would have to be dismissed as time-barred.

I. Factual Background

The connection between Pyramid and International in the context of this lawsuit, is not immediately apparent. Therefore, the Court will briefly explain the various links in this litigation chain, accepting as true for the purposes of deciding this mo-

tion, most of Pyramid's allegations. Pyramid is a British Virgin Islands corporation with its principal place of business in the Cayman Islands, British West Indies. At the outset, this dispute arose out of a business relationship between Pyramid and Washington International Bank and Trust Limited ("WIBT"), which is located in the Cayman Islands and organized and licensed under Cayman Islands law. Pyramid owned and traded stocks and other securities for its own account, and it paid WIBT commissions to administer Pyramid's accounts with various brokerage houses, serve as Pyramid's agent in investment and banking matters, and perform certain bookkeeping and accounting functions for Pyramid. WIBT was a subsidiary of the defendant International, an Arizona corporation with its principal place of business in the District of Columbia.

Nicholas J. Duggan, WIBT's President and Manager, personally oversaw WIBT's activities relating to Pyramid. In June of 1981, upon Duggan's recommendation, Pyramid entered into an agreement with Linda Pearson and E.F. Hutton & Co. ("Hutton"), making Pearson and Hutton securities brokers on Pyramid's behalf. Pearson and Hutton sold and purchased securities on Pyramid's behalf for over two months, but on or about August 31, 1981 Pyramid's President, Edward J. Attridge, told Duggan and WIBT, as well as Pearson and Hutton, that all trading on Pyramid's account should cease. In spite of this directive, Pearson "churned" Pyramid's account from the beginning of September 1981 (when Pearson apparently knew that Attridge was in Hawaii on his honeymoon) until about the end of November 1981 (when Attridge returned from his honeymoon and discovered the churning). Pearson's unauthorized trading of approximately $4.5 million worth of stock through Pyramid's account reduced the value of the account from about $890,000 to $40,000.

In November 1981, when Attridge first discovered Pear-

son's unauthorized trading, he made inquiries of WIBT, which usually received telexes from brokers, including Hutton, confirming transactions involving Pyramid's accounts. According to Pyramid, WIBT disclaimed any knowledge of Pearson's churning of Pyramid's accounts and stated that it had not received any trade confirmations from Hutton since August 31, 1981. In 1983 Pyramid brought suit against Pearson and Hutton, and in December 1985, Pyramid recoverd $850,000 from Hutton pursuant to a settlement agreement.

At some point during the Hutton litigation, Pyramid learned that WIBT and its officers participated in the churning; that they knew of the unauthorized trades before they were complete; and that they had recorded these trades in a "secret" ledger. Armed with this newly discovered information and believing that the settlement with Hutton did not fully compensate it for its damages, Pyramid filed suit against, *inter alia*, WIBT and International in the Southern District of Florida. However, Judge Marcus dismissed the case because the Cayman Islands "citizenship" of both Pyramid and WIBT meant that there was not complete diversity between the parties.

At long last, we arrive at the final link in the chain: Pyramid's filing of this suit, in which International is the only named defendant. Pyramid's Complaint charges International with: (1) breach of contract, (2) breach of fiduciary duty, (3) negligence, (4) civil conspiracy, (5) fraud, and (6) violations of the RICO statutes. Relying exclusively on a "piercing the corporate veil" theory to hold International liable for WIBT's wrongful acts, Pyramid alleges that International "has continually exercised substantial control over the operations as WIB[T]" and that "[s]uch control and domination . . . has rendered WIB[T] a 'mere instrumentality' of International . . . , thereby rendering International . . . liable for the wrongful acts of its subsidiary WIB[T]." Complaint – 38. International has now filed

a renewed dispositive motion.[1] Both parties having presented — and the Court having considered — matters outside the pleading, the Court will treat International's motion as one for summary judgment. *See*, Fed. R. Civ. Proc. 12(b), 56.

II. Analysis

Rule 56(c) of the Federal Rules of Civil Procedure requires that the Court grant a motion for summary judgment if the pleadings and supporting affidavits and other submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Moreover, it is well-established that the Court must believe the non-movant's evidence and must draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

A. The RICO Claims

Pyramid alleges that International (through the acts of its "dominated" subsidiary WIBT), Duggan, Pearson, and Hutton violated and conspired to violate the RICO laws, 18 U.S.C. §§ 1962(c), (d), and also that WIBT and Duggan conspired to conceal those violations from Pyramid. Both parties agree

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[1]By prior Order filed December 29, 1988, the Court considered International's initial motion to dismiss. In that Order the Court stated: "[T]he record before it lacks sufficient development to permit the dismissal [International] seeks. Yet, at the same time, the present state of the record does suggest that certain of International's contentions . . . may have merit if properly supported." The Court therefore denied International's motion to dismiss without prejudice, permitted additional time for further discovery, and gave both parties the opportunity to submit dispositive motions at the close of further discovery.

that a violation of § 1962(c) consists of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted). Pyamid alleges that WIBT, Duggan, Pearson, and Hutton conducted "racketeering activity," *see* § 1961(1), consisting of, *inter alia:* securities fraud, mail fraud, wire fraud, and conspiracy to violate RICO. Moreover, Duggan, WIBT, Pearson, and Hutton allegedly formed an enterprise (a so-called "association-in-fact") for the legitimate trading of securities long before Pearson's churning of Pyramid's account.

Assuming for the purposes of this discussion that Pyramid could withstand summary judgment on these other elements of RICO,[2] Pyramid has failed to raise a genuine issue of material fact regarding the "pattern" element. A pattern is an essential element of both the § 1962(c) claim and the § 1962(d) RICO conspiracy claim, which is predicated solely upon the alleged § 1962(c) violation.[3] Since Pyramid has failed to establish the pattern element, International is entitled to judgment as a matter of law on both RICO claims.

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[2]In light of the Court's holding announced herein, it need not address International's other arguments that Pyramid has failed to establish both an enterprise and racketeering activity conducted by International or WIBT and Duggan. Other arguments raised by International in one or both of its motions to dismiss that the Court does not now need to address include: the inapplicability of RICO to activities taking place outside of the United States, WIBT's status as an indispensable party, *forum non conveniens*, prior satisfaction, and Cayman Islands law on piercing the corporate veil.

[3]The pattern element is equally significant in a RICO conspiracy claim based upon § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of . . . [§ 1962(c)]."") as it is in a RICO claim based upon § 1962(c). The issue in RICO cases comes down to whether there was conduct of, or a conspiracy to conduct, an enterprise through a pattern of racketeering activity, and therefore either way the question of pattern plays a determinative role. *See Shearin v. E.F. Hutton Group*, 885 F.2d 1162, 1169 (3d Cir. 1989) "All that need be shown is that the conspirators agreed to engage in a pattern of racketeering ac-

In *H.J., Inc., v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), the Supreme Court recently attempted to clarify what a plaintiff must show to satisfy the "pattern" element of a RICO claim. The Court emphasized that:

> the section of the statute headed "definitions," 18 U.S.C. § 1961, does not so much define a pattern of racketeering activity as state a ***minimum necessary condition*** for the existence of such a pattern. Unlike other provisions in § 1961 that tell us what various concepts used in [RICO] "mean," § 1961(5) says of the phrase "pattern of racketeering activity" only that it "requires at least two acts of racketeering activity . . . [occurring within a ten-year period]." It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.

Id. at 2899 (emphasis added). The *H.J.* Court then went on to expand upon the idea, previously mentioned in *Sedima*, that "while two acts are necessary, they may not be sufficient," *Id.* (quoting *Sedima*, 479 U.S. at 496 n.14).

If it was at all unclear before *H.J.*, it is now established that merely proving two predicate acts without more is insufficient to satisfy the pattern element of a RICO claim. An analysis

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tivity."); *United States v. Brooklier*,685 F.2d 1208, 1222 (9th Cir. 1982) ("If the agreement or combination is undertaken to establish or participate in an enterprise and to do it through a pattern of racketeering, there is a conspiracy to commit the underlying RICO offense."), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.) ("Thus the object of a RICO conspiacy is to violate a substantive Rico provision — here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity — and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity."), *cert. denied*, 439 US 953 (1978); *Medallion TV Enterprises v. SelecTV*, 627 F.Supp. 1290, 1301 (C.D. Cal. 1986) ("Plainitffs [sic] have produced no evidence, and the Court can discern none, raising a genuine issue of fact that defendants conspired to engage in a 'pattern ' of racketeering activity."), *aff'd on other grounds*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 3241 (1989).

of RICO's legislative history led the *H.J.* Court to conclude that "continuity plus relationship" produce a "pattern." *Id.* at 2900. Thus, in addition to satisfying the statutory prerequisite of showing at least two predicate acts, a plaintiff "must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* (emphasis in original).

Even if Pyramid's allegations and supporting documents are sufficient to show two or more related predicate acts, Pyramid has failed to raise a genuine issue of material fact on the continuity prong of the pattern element. *H.J.* established two methods for demonstrating continuity: " 'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id* at 2902.

(1) Threat of Continued Criminal Activity

There is nothing on this record from which the Court can infer that the predicate acts alleged by Pyramid by their nature constitute a ***threat*** of continued racketeering activity. This conclusion is buttressed by a comparison between the instant case and the scenarios used by the *H.J.* Court as illustrative, albeit non-exhaustive, examples of racketeering acts threatening future criminal conduct. The churning of Pyramid's account is qualitatively different from the Supreme Court's scenarios, in which a hypothetical "hoodlum" extorts money from storekeepers, telling them that he will reappear once every month to collect his "premium," or "in which the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.*

Unlike the *H.J.* Court's examples, the scheme to churn Pyramid's account simply does not pose a threat of continued racketeering activity nor is there any indication on the record

that churning is part of International's regular way of doing business. *Compare United States v. Alexander*, 888 F.2d 777, ____ (11th Cir. 1989) (*H.J.*'s threat of continued criminal activity requirement satisfied because school board official extorted, or conspired to extort, money each year from 1977 to 1984 and would have continued to do so); *United States v. Kaplan*, 886 F.2d 536, 542-43 (2d Cir. 1989) (applying *H.J.* to hold pattern element satisfied, even though predicate acts consisted of only two instances of bribing city officials; "external facts" of defendant's willingness to facilitate corruption generally within government agency and his pursuit of another bribery scheme at time when investigation halted further activities would permit finding that predicate acts entailed threat of continuing racketeering activity); *Combs v. Bakker*, 886 F.2d 673, 677-78 (4th Cir. 1989) (applying *H.J.* to hold that scheme, in which interstate wire and mail facilities were allegedly used to fraudulently sell partnerships in "PTL" enterprise to over 55,000 individual victims, amounted to threat of contiued criminal activity and satisfied pattern element).

(2) Closed Period of Repeated Conduct

Pyramid fares no better in demonstrating continuity by attempting to show a "closed period of repeated conduct." The *H.J.* Court seemed to have exactly this type of case in mind when it stated:

> [Continuity] is . . . centrally a temporal concept . . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates *extending over a substantial period of time.* Predicate acts *extending over a few weeks or months* and threatening no future criminal conduct *do not satisfy this requirement:* Con-

> gress was concerned in RICO with *long-term criminal conduct.*

H.J., 109 S.Ct. at 2902 (emphasis added). The Court then went on to reverse the dismissal of a RICO claim, which alleged that ***many*** defendants (Northwestern Bell Telephone Company officers and employees, members of the Minnesota Public Utilities Commission (MPUC), and other unnamed individuals and corporations) had bribed five members of the MPUC over ***at least a six-year period,*** causing injury to ***many victims*** (a class consisting of customers of the telephone company). *See id.* at 2897, 2906. In light of *H.J.*'s language — even resolving all justifiable inferences in Pyramid's favor — the Court holds that the churning of Pyramid's account over a period of no more than three months, with the alleged active participation and assistance of WIBT and Duggan, does not amount to long-term criminal conduct within the reach of RICO.

In an apparent attempt to conform its Complaint to the recent changes in RICO jurisprudence wrought by *H.J.*, Pryamid in its opposition to International's renewed motion for the first time argues a "concealment of racketeering" theory. Under this theory, the pattern of racketeering activity allegedly "consisted of a variety of predicate acts committed by WIBT and Duggan from September 1981 through at least 1985." Pyramid Renewed Opposition at 18. The Court disagrees with Pyramid's characterization of this three-month-long churning scheme as a pattern of racketeering activity lasting for over four years. The conspiracy — and the racketeering activity for purposes of deciding whether the continuity prong of RICO's "pattern" element has been satisfied — both terminated around the end of November 1981 when Pyramid first discovered the churning by Pearson and Hutton.[4]

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[4]Pyramid alleges that, in an effort to conceal their involvement in the churning scheme, WIBT and Duggan committed mail and wire fraud, as well as perjury, in furtherance of the conspiracy. It is true that the use

In addition to relying upon *H.J.* itself for guidance, this Court reached this conclusion after engaging in the kind of flexible, common-sense, fact-specific analysis contemplated by *H.J.*, 109 S.Ct. at 2901-02. As discussed above, continuity is primarily a temporal concept, but other relevant factors include: (i) the number and variety of predicate acts; (ii) the number of victims; (iii) the number of perpetrators; (iv) the presence of separate schemes; and (v) the occurrence of distinct injuries. *See Parcoil Corp. v. NOWSCO Well Serv., Ltd.*, 887 F.2d 502, 504 (4th Cir. 1989) (applying *H.J.*); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d

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of the mails or wires to conceal fraud may itself violate the mail or wire fraud statutes. *See, e.g., United States v. Lane*, 474 U.S. 438, 451 (1986); *SEC v. Holschuh*, 694 F.2d 130, 143-44 (7th Cir. 1982). However, Pyramid's argument fails because this general proposition of law is true only if the post-fraud use of interstate mail or wire facilities was for the purpose of "executing the scheme" and avoiding detection of the fraud by "lulling" the victims into a false sens of security. *See Lane*, 474 U.S. at 451; *Holschuh*, 694 F.2d at 143-44.

Pyramid erroneously equates "concealment of a fraud" with "concealment of a party's involvement in an already-discovered fraud" and therefore misapplies this general proposition to the facts of this case. The record is crystal clear that Pyramid discovered Pearson and Hutton's churning of its accounts no later than the end of November 1981. That is when the fraud was discovered and when Pyramid began investigating the churning and preparing to take legal action against Pearson and Hutton, the prime executors of the scheme who have since paid Pyramid $850,000 in settlement of Pyramid's separate suit against them. Even assuming that the acts of concealment occurred and continued through 1985 as alleged, Pyramid had already discovered the churning so the only possible concealment was of WIBT and Duggan's involvement in the scheme. Because Pyramid could not have been "lulled" into a false sense of security once it discovered the churning, the conspiracy and the pattern of racketeering activity did not extend beyond the end of November 1981. *See United States v. Steele*, 685 F.2d 793, 801 (3d Cir. 1982) (illegal conspiracy and concealment objective terminated, as a matter of law, no later than date of prime defendant's disclosure of bribery scheme to law enforcement officials; therefore, any subsequent uses of wires and mails by prime defendant and other defendants could not have furthered illegal conspiracy).

Cir. 1989) (same); *Sutherland v. O'Malley*, 882 F.2d 1196, 1204 (7th Cir. 1989) (same).[5] Not only was the churning in this case of limited duration, but on this record it was nothing more than one narrowly circumscribed scheme involving essentially similar predicate acts with one victim suffering one economic injury.

Moreover, a review of circuit court cases that have applied *H.J.*'s "closed period of repeated conduct" theory demonstrates that the churning of Pyramid's account did not amount to long-term criminal activity.[6] The instant case has

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[5]Notwithstanding Pyramid's arguments to the contrary, *H.J.* did not prohibit courts from engaging in this type of case-by-case analysis of various factors relevant to the continuity issue. The *H.J.* Court did not hold that the presence or absence of multiple schemes is irrelevant or that the courts may not analyze this issue as one, non-determinative factor in deciding whether continuity has been established. *See H.J.*, 109 S.Ct. at 2901 ("[A]lthough proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is shown *only* by proof of multiple schemes." (emphasis in original)); *Sutherland v. O'Malley*, 882 F.2d 1196, 1204 (7th Cir. 1989) ("[I]t is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.").

[6]Apparently, *H.J.*'s impact on the District of Columbia Circuit's RICO jurisprudence has not yet been precisely delineated. The United States Court of Appeals for this Circuit most recently addressed the continuity issue in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*,883 F.2d 132 (D.C. Cir. 1989) (Mikva, J., with Wald, C.J. and Edwards, J.) a case which previously had been vacated and remanded by the Supreme Court for further consideration in light of *H.J.* and the pattern issue, the panel reversed the district court's dismissal of RICO claims, holding that "[w]hile the 'continuity' of the alleged predicate acts is a closer question [than their 'relatedness'] because of the relatively short duration of the strike, these acts could, if proved, establish 'a distinct threat of long-term racketeering activity, either explicit or implicit.' " *Yellow Bus Lines*, 883 F.2d at 145. What significance this Court should attach to the *Yellow Bus Lines* panel opinion is unclear because on October 17, 1989 the Court of Appeals granted rehearing *en banc*.Thus, at least for the time being, this Court will also turn to cases from other circuits for guidance in how to apply *H.J.*.

many parallels with *Parcoil Corp.*, 887 F.2d at 503, in which the racketeering activity consisted of a contractor instructing its subcontractor to use one composition of sand in "fracturing" the plaintiff's oil and gas wells but write another composition on the invoices. Consequently, the subcontractor sent the plaintiff seventeen falsified reports over a four-month period. *Id.* The Fourth Circuit stated that "[i]t takes scant analysis to discern that this is not the type of continuity contemplated by *H.J.*," *Id.* at 504, and affirmed the district court's grant of summary judgment.

In *Sutherland v. O'Malley*, 882 F.2d 1196 (7th Cir. 1989), the Seventh Circuit also applied *H.J.* to hold that the plaintiff failed to satisfy the continuity prong of RICO's pattern element. The plaintiff charged O'Malley, who had been the plaintiff's co-counsel in a personal injury action, with a RICO violation (predicated on extortion and multiple acts of mail fraud) after O'Malley allegedly diverted settlement checks away from the plaintiff and refused to pay the plaintiff her share of the contingency fee. The Seventh Circuit held that the predicate acts relied upon by the plaintiff neither amounted to, nor constituted a threat of, continuing racketeering activity. *Id.* at 1205. Several factors, all equally applicable to the instant case, contributed to this conclusion: there was "only one dishonest undertaking" accomplished "in a single five-month period" with "only one victim" who suffered "only one distinct economic injury." *Sutherland*, 882 F.2d at 1204-05.

Another case that is analogous to the case before the Court is *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989). Wasserman allegedly violated the RICO laws by pursuing a scheme to defraud two corporations of their investments in oil and gas properties. *Id.* at 682. The Fourth Circuit affirmed the district court's dismissal of the RICO claim for failure to allege a pattern of racketeering activity. Explaining its con-

clusion that the plaintiff's allegations did not satisfy the continuity prong, the appellate court emphasized that: (i) the defendant's actions "were narrowly directed towards a single fraudulent goal"; (ii) "[t]hey involved a limited purpose"; (iii) "[t]hey involved but one perpetrator"; (iv) "[t]hey invovled but one set of victims"; and (v) "the transaction took place over approximately one year." *Id.* at 684.

Applying the same analysis to the record before this Court reveals that all of *Wasserman*'s factors (except the number of perpetrators involved) favor the same finding of lack of continuity in this case, especially considering that the *Wasserman* scheme lasted four times longer than the churning of Pyramid's account for three months. Furthermore, the three cases discussed above, which held that continuity was not established, involved schemes lasting between four months and one year. By comparison, *H.J.* itself and those post-*H.J.* cases holding that the plaintiff's allegations satisfied the "closed period of repeated conduct" version of continuity all had something, as set forth in the margin, that the instant case does not: a scheme or schemes lasting two or more years (the one exception being a fourteen-month-long scheme) and, in most cases, also multiple victims or multiple schemes.[7]

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[7]*See Morley v. Cohen*, 888 F.2d 1006, ____ (4th Cir. 1989) (continuity established by duration of predicate acts of mail and wire fraud committed as part of scheme lasting more than four years); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 994-95 (8th Cir. 1989) (in addition to lasting "for over three years," defendants' defrauding of subcontractors involved two "schemes," "different victims," and "a complex series of activities," such as creation of "numerous corporate entities"); *Shearing v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) ("three perpetrators [were allegedly] involved in at least one open-ended scheme to defraud presumably numerous investors and . . . honest employees as well — a scheme that lasted at least . . . two years); *Swistock v. Jones*, 884 F.2d 755, 759 (3d Cir. 1989) (scheme to defraud in connection with defendants' lease of coal-producing properties to plaintiffs involved numerous acts of mail and wire fraud over fourteen-month period);

Consequently, the Court, mindful of its responsibility to read the RICO statute broadly, *see H.J*, 109 S. Ct. at 2905; *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985), nevertheless must hold that on this record Pyramid has failed to raise a genuine issue of material fact as to whether the churning amounted to, or posed a threat of, continued criminal activity.[8] As the *Wasserman* court insightfully observed:

> This case presents a paradigm of one in which no pattern of racketeering activity is present. If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim. If we were to recognize a RICO claim based on the narrow fraud alleged here, the pattern requirement would be rendered meaningless. We refuse, as did *H.J., inc.*, to read the statutory term as surplusage.

Wasserman, 886 F.2d at 685 (4th Cir. 1989) (citations omitted).

Jacobson v. Cooper, 882 F.2d 717, 720 (2d Cir. 1989) (mail and wire fraud, extortion, larceny and other acts allegedly committed to deprive plaintiff of interest in real estate enterprise extended over "a matter of years, from 1980 until the filing of this action"); *United States v. Gelb*, 881 F.2d 1155, 1164 (2d Cir.) (defendant's schemes to avoid paying postage on mass mailings "were conducted for about five years, and but for their discovery surely would have continued"), *cert. denied*, No. 89-723, 109 S.Ct. ____ (1989) (1989 WL 136830).

[8]This conclusion by no means implies that the churning scheme alleged by Pyramid was lawful or that Pyramid was left unarmed without a remedy for any injury caused by the churning. As previously mentioned, *supra*, note 4, Pyramid has received a substantial settlement payment from Pearson and Hutton. Moreover, Pyramid had other "weapons" at its disposal. As the rest of the Complaint indicates, Pyramid has resorted to various other theories based upon alleged violations of state law. This Court's holding means nothing more than that Pyramid may not use the most powerful weapon in its arsenal, because the civil RICO "bazooka" was not designed to attack activities, such as the churning of Pyramid's account, which do not "amount to or threaten long-term criminal activity." *H.J.*, 109 S. Ct. at 2902 n. 4.

B. The Remaining State Law Claims

In addition to invoking this Court's jurisdiction by relying upon the federal question presented by its RICO claim, Pyramid also alleges that the Court's jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. With the dismissal of the RICO claim, as discussed above, the federal question disappears, and diversity becomes the only possible basis for the Court to exercise jurisdiction over Pyramid's remaining state law claims.

At first glance, there seems to be complete diversity between Pyramid (an alien) and International (a citizen of Arizona and the District of Columbia). However, the issue is not that clear-cut because WIBT, International's subsidiary, is also an alien.[9] Although WIBT is not named as a defendant in this suit, Pyramid's claims against International are, in every respect, based exclusively upon WIBT's alleged misconduct. Pyramid repeatedly alleges and argues that International's complete control and domination of WIBT rendered WIBT a "mere instrumentality" of International and that therefore International should be liable for WIBT's wrongful acts.

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[9]Noting that "WIBT is no longer a part of [International], having been sold in January, 1989, approximately one year following the commencement of this suit," Pyramid argues that "WIBT is not pertinent to [Internatonal's] contrived efforts to destroy diversity jurisdiction." Pyramid Renewed Opposition at 24. However, as explained in more detail below, WIBT's citizenship is pertinent and indeed outcome-determinative. In any event, it is completely irrelevant that WIBT has since been sold because federal courts must look to the citizenship of the parties *on the date the complaint was filed* to determine whether they have diversity jurisdiction. *See, e.g., Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); *Hawes v. Club Ecuestre El Commandante*, 598 F.2d 698, 701 (1st Cir. 1979). The record is clear that then this suit was filed WIBT was International's subsidiary and was a Cayman Islands corporation.

Pyramid's theory of "piercing the corporate veil" and holding International vicariously liable for the misfeasance of its subsidiary implicates one of the more arcane areas of diversity jurisdiction law: whether the subsidiary's citizenship should be imputed to the parent corporation. It is true, as Pyramid contends, that "subsidiary and parent corporations are generally considered to be separate entities for diversity jurisdiction purposes." *U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 7 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 2064 (1989). But this by no means completes the analysis required to determine International's citizenship for the purposes of this Court's jurisdiction.[10]

Although the proposition of law cited above is generally correct, several courts have recognized and applied an "alter ego" exception when the parent corporation is being sued solely for the acts of its completely controlled subsidiary. In *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553 (5th Cir. 1985), for example, the court vacated and remanded due to its "serous doubts" about the district court's subject matter jurisdiction and held "that Northwest, as alter ego of First Commercial [Northwest's wholly-owned subsidiary], acquired the Colorado citizenship of First Commercial for purposes of subject matter jurisdiction of this action." *Id.* at 558; *see Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 291 (5th Cir. 1989) ("no diversity jurisdiction existed to entertain the action of the alien plaintiff . . . against Geosource, because Geosource is also an alien once it assumes the

[10]In *U.S.I. Properties*, as in most of the other cases addressing the parent-subsidiary diversity jurisdiction issue, the plaintiff sued the subsidiary and attempted to impute the parent corporation's citizenship to the subsidiary. It is unclear whether the same standards should apply when the roles are reversed and the defendant is the parent company attempting to assume the citizenship of its subsidiary, whose wrongful acts are the only basis for holding the parent liable.

residence of [its alter ego subsidiary]''); *Chesco Co. v. National Gypsum Co.*, 649 F. Supp. 65, 66-67 (E.D.N.Y. 1986) (even if court assumes that National Gypsum and its wholly-owned subsidiary are one corporate entity, court would dismiss for lack of complete diversity because both subsidiary and plaintiff are incorporated in New York).

Thus, for purposes of diversity jurisdiction, a corporation may have multiple citizenships: its place of incorporation, its principal place of business, and the place of incorporation of its alter ego subsidiary. *Panalpina Welttransport GMBN v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985). The *Panalpina* court's language is particularly appropriate in this case:

> [T] alter ego doctrine may be used to add places of citizenship to the abrogation of diversity jurisdiction . . . . Consistent therewith, if a parent were sued as a result of activities of a subsidiary, the alter ego doctrine would attribute the subsidiary's place of incorporation to the parent ***even if such resulted in destroying complete diversity.***

Id. at 354-55 (emphasis added).

This Court is persuaded by the reasoning of the above-cited cases discussing and applying the alter ego doctrine. A question of such fundamental importance as the subject matter jurisdiction of the federal judiciary should be decided without ''elevat[ing] form over substance.'' *Freeman*, 754 F.2d at 557. If a parent corporation wholly dominates its subsidiary, then they are in substance one entity, and a federal court should not exercise diversity jurisdiction if that ''conclusion can be reached only by blind adherence to form and equally blind disregard of the facts.'' *Id.* at 558. Moreover, it is settled law that the statute conferring federal jurisdiction should be

strictly construed. *Thomas v. Gaskill*, 326 U.S. 442, 446 (1942); *Whitelock v. Leatherman*, 460 F.2d 507, 514 (10th Cir. 1972). Finally, the alter ego doctrine is entirely consistent with Congress' intent, in enacting 28 U.S.C. § 1332(c) and assigning corporations multiple citizenships, to reduce the number of diversity cases filed in federal court. *See Freeman*, 754 F.2d at 558 (citing S. Rep. No. 1830, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3099, 3101-02); 1 *Moore's Federal Practice* ¶ 0.78[2], at 723.55 & n.26 (same).

To put it more bluntly, if this were a coin toss, Pyramid would be calling both "heads" and "tails." All six of the counts in its Complaint allege that International is liable solely because of the wrongful acts of International's completely controlled and dominated subsidiary. Therefore, Pyramid's entire case against International hinges on this Court's accepting its "piercing the corporate veil" theory. But at the same time, Pyramid argues on the diversity jurisdiction issue that a defendant corporation's "corporate veil is generally not to be pierced for the purpose of aggregating its corporate incidents with those of its subsidiary companies." Pyramid Renewed Opposition at 25 (quoting *Horwat v. Raulsen-Webber Cordage Corp.*, 336 F. Supp. 1020, 1021 (W.D. Pa. (1971)).[11]

Either way, Pyramid's remaining state law claims must be dismissed. If WIBT was not International's alter ego, then Pyramid may not hold International liable for wrongful acts that as

[11]As Pyramid notes, International may also have taken inconsistent positions by arguing, on the one hand, that it should not be held liable because WIBT was a separate and distinct entity and, on the other hand, that there is no diversity jurisdiction because International assumes WIBT's alien citizenship under the alter ego doctrine. However, International's inconsistency, if any, is irrelevant on this issue because it is well-established that when diversity is challenged, the party asserting federal jurisdiction — in this case Pyramid — has the burden of proof. *E.g.*, *Thomson v. Gasskill*, 315 U.S. 442, 446 (1942); *Hawes v. Club Ecuestre El Commandante*, 598 F.2d 698, 702 (1st Cir. 1979). On this record, Pyramid has failed to carry its burden.

Pyramid itself alleges, were committed not by International but by is subsidiary WIBT. If, however, WIBT was International's alter ego, then International (taking on WIBT's foreign citizenship) and Pyramid are both aliens and this Court does not have diversity jurisdiction. *See* 28 U.S.C. § 1332. Because Pyramid's position in its Complaint and many subsequent pleadings has consistently been — with the one exception noted above — that International completely dominated its wholly-owned subsidiary WIBT, the Court will apply the alter ego doctrine and dismiss the remaining state law claims for lack of subject matter jurisdiction.

Assuming *arguendo* that this Court has jurisdiction based on complete diversity between the parties, the remaining state law claims must nevertheless be dismissed as time-barred. Pyramid argues, and the Court accepts as true, that WIBT and Duggan's fraudulent concealment of their involvement in the churning tolled the statute of limitations. Since the "fraudulent concealment tolls a statute of limitations only for so long as the concealment endures," *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992, 996 (D.C. 1978), the Court must determine the date on which Pyramid knew, or by the exercise of due diligence should have known, that it may have had a cause of action against International. *See Westinghouse Elec. Corp. v. City of Burlington, Vermont*, 351 F.2d 762, 764 (D.C. Cir. 1965); *Bailey v. Greenberg*, 516 A.2d 934, 941 (D.C. 1986).

International's argument, supported by a certain amount of persuasive evidence, is that Pyramid discovered WIBT and Duggan's involvement in the churning no later than November 14, 1984. International contends that on or about that date Pyramid, through its attorney, received from WIBT a copy of a "confidential" securities mail register, in which WIBT had recorded its receipt of trade confirmation invoices and telexes from Pearson or Hutton during the three-month churn-

ing period. Indeed, the words of Pyramid's own President, sworn to in an affidavit filed during one of Pyramid's prior lawsuits in the United States District Court for the Southern District of Florida, support International's argument in no uncertain terms: "It was from that securities mail register, which was first produced in November of *1984*, that I learned [WIBT] had, in fact, received on a timely basis the confirmations or invoices for each of the unauthorized trades in and out of Pyramid's account." Attridge Affidavit ¶ 14, International Motion to Dismiss Exhibit E (emphasis in original).

Moreover, International has also presented the Court with copies of letters from WIBT's accountant to Attridge dated October 21 and December 2, 1981, both of which are almost identical and state respectively: "We enclose herewith copies of contract notes received in respect of purchases and sales of securities [for Pyramid Securities Limited]" during the month of September/during the months of October and November 1981. International Motion to Dismiss Exhibit D. Pyramid was therefore put on notice that there had been some activity in its account from September through November 1981. Even if, as Pyramid argues, these letters failed to put Pyramid on notice that there had been any trading by *Hutton* (as opposed to trading by one of Pyramid's numerous other brokers), International has submitted a copy of a letter from WIBT's accountant to Attridge dated *February 18, 1982* that specifically mentions Hutton: "We also enclose herewith contract notes received to date in respect of purchases and sales by E.F. Hutton & Co., relating to purchase and sale of stock in [three named companies]." *Id.* Moreover, this letter indicates that a copy was sent to Pyramid's accounting firm, Coopers & Lybrand.

Consisting of affidavits of its President and its accountants, Pyramid's response to those pieces of evidence is simply insufficient to satisfy Fed. R. Civ. Proc. 56(e) and preclude sum-

mary judgment on the statute of limitations issue.[12]. In the Court's view, a reasonable finder of fact would conclude that Pyramid knew, or reasonably should have known, by no later than November 14, 1984 that WIBT had been involved in the three-month-long churning of its account. Both parties agree, and the Court concurs, that the statute of limitations on Pyramid's common law claims is three years. *See* D.C. Code Ann. §§ 12-301(7) (applies to breach of contract,), 12-301(8) (applies to breach of fiduciary duty, negligence, civil conspiracy, and fraud). Because Pyramid waited from November 14, 1984 until December 31, 1987 to file this suit, the Court, if it had subject matter jurisdiction, would dismiss Pyramid's remaining state law claims as time-barred.

III. Conclusion

The Court grants International's motion for summary judgment on Pyramid's RICO claims because Pyramid has failed to raise a genuine issue of material fact as to whether the three-month-long churning scheme satisfies the "continuity" prong of RICO's pattern element. The Court further holds that it does not have subject matter jurisdiction over the remaining

[12]Attridge's sworn statements that he did not know of WIBT's involvement until December of 1985 do nothing more than contradict his affidavit quoted above that was filed in prior litigation in the Southern District of Florida. While these unexplained inconsistent affidavits may create some dispute about the credibility of any of Attridge's statements, they are not sufficient to rise to the level of creating a genuine issue of material fact. Moreover, although Pyramid's two Coopers & Lybrand accountants deny receipt of the letters allegedly sent to them by WIBT's accountant in the end of 1981, Pyramid Opposition to Motion to Dismiss, Exhibits 6, 7, neither of these affidavits in any way denies receipt of the damaging February 18, 1982 letter from WIBT's accountant, which specifically mentions trading by Hutton and provides a company-by-company list of the stock held by Hutton in Pyramid's account. Thus, on the record before the Court, the February 18, 1982 letter putting Pyramid on notice of WIBT's involvement in the churning is rebutted by nothing more than the affidavit of the plaintiff's President.

state law claims because there is no diversity between Pyramid, an alien and International, which under the alter ego doctrine assumes the alien citizenship of its dominated subsidiary WIBT. However, even if the Court could properly assert diversity jurisdiction, it would grant summary judgment because Pyramid's remaining state law claims are barred by the various statutes of limitations.

An Order in accordance with the foregoing Opinion will be issued of even date herewith.

CHARLES R. RICHEY
UNITED STATES DISTRICT COURT

December 19, 1989

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 87-3541

Filed DEC 19, 1989
JAMES E. DAVEY
Clerk

Pyramid Securities Limited

Appellant

v.

IB Resolution, Inc.

ORDER

In accordance with the Court's Opinion of even date herewith, it is, by the Court, this 19th day of December, 1989,

ORDERED that the defendant's motion for summary judgment shall be, and hereby is, GRANTED.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 87-3541

Filed Dec 29 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Pyramid Securities Limited
Plaintiff,

v.

IB Resolution, Inc.
Defendant.

APPEARANCES

Plaintiff: Michael J. McManus, Warren Lutz, Jackson & Campbell, P.C., Washington, D.C.

Defendant: Sheila J. Carpenter, Sutherland, Asbill & Brennan, Washington, D.C.; Of Counsel: Jeffrey P. Hahn, Arlington, Virginia.

OPINION AND ORDER
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

This matter came before the Court on the motion of the defendant, International Bank ("International"), to dismiss the complaint of the plaintiff, Pyramid Securities Limited ("Pyramid"), on any of six different grounds. After careful consideration of International's motion, supporting memoranda and accompanying affidavits, and Pyramid's responses thereto, the Court is of the opinion that the record before it lacks sufficient development to permit the dismissal Pyramid seeks.

yet, at the same time, the present state of the record does suggest that certain of International's contentions, as described below, may have merit if properly supported. Accordingly, the Court has determined to deny International's motion to dismiss, but without prejudice. In reaching its decision, the Court notes that discovery in this action was stayed pending a decision on International's motion. The Court, therefore, recognizes that the parties have not had sufficient opportunity to develop the factual foundation which might have underlay this motion had a stay not been in place. With this in mind, the Court will allow the parties ninety days from the date hereof to conduct further discovery respecting the matters alleged in Pyramid's complaint, and will allow both parties the opportunity to submit whatever dispositive motions may be appropriate at the end of that period.

Although the Court will certainly permit the parties to reiterate positions taken in the motions filed thus far, the following discussion may prove useful for purposes of conducting discovery and formulating future arguments.

International's first contention, that WIB is a necessary and indispensible party under Fed. R. Civ. P. 19(a) and (b), and that the complaint should therefore be dismissed, fails in light of the fact that Pyramid's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") has not been shown to be clearly inadequate as a matter of law. As the parties recognize, if Pyramid's RICO claim cannot be dismissed at this stage, independent federal question jurisdiction exists under 28 U.S.C. § 1331. Notwithstanding International's arguments to the contrary, Pyramid has pleaded facts which, if true, appear to establish a sufficient nexus with the United States to trigger application of RICO. *Republic of the Phillipines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987). It is possible that Pyramid's RICO claim could be dismissed on grounds

other than territorial scope, but that question is not ripe for decision in light of the present state of the record and the papers before the Court.

International's second contention is that each of Pyramid's claims are barred by the applicable statute of limitations. As briefed by the parties, this question turns upon the precise date at which Pyramid became aware, or should have become aware, of WIB's alleged confederacy with Linda Pearson and E.F. Hutton. International contends that Pyramid obtained knowledge in 1984, while Pyramid claims not to have known until 1986. As documented thus far, this question appears to present a genuine issue of material fact. Accordingly, in light of the record before the Court, judgment cannot be granted in International's favor at this time with respect to International's statute of limitations arguments.

International's third contention is that the doctrine of *forum non conveniens* mandates a dismissal of this action. However, the Court is unwilling to dismiss this action in light of the present state of the factual record. While the Court recognizes that a "motion to dismiss for *forum non conveniens* does not call for a detailed development of the entire case," *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 n.3 (2d Cir. 1975), the Court is concerned that it lacks an adequate understanding of precisely where the equities lie, and that it lacks sufficient factual material to engage in the reasoned balancing of the public and private interests required by Supreme Court precedent. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp . v. Gilbert*, 330 U.S. 501 (1947). The present record does not permit the Court a detailed understanding of how trial in the District of Columbia would "establish . . . oppressiveness and vexation to [International] . . . out of all proportion to [Pyramid's] convenience." *Piper*, 454 U.S. at 241. Although the Court recognizes that a *forum non conveniens* dismissal might ultimately be appropriate in this case, the Court

is equally mindful of its duty to adequately explain the basis of such a decision. *See, e.g., Lacey v. Cessna Aircraft Co.*, No. 87-3822 (3d Cir. November 21, 1988) (Becker, J.)

International's fourth argument is that Pyramid has failed to state a claim under RICO. For the reasons discussed above with respect to International's Rule 19 argument, this contention fails.

International's fifth argument is that Pyramid has received complete compensation for its harms by virtue of its settlement with Pearson and E.F. Hutton. However, even if equity would require a dismissal on the grounds of prior satisfaction, the present state of the record suggests to the Court that some question exists as to whether Pyramid *has* been completely satisfied. Further factual development would be required before the Court could properly conclude, short of trial, that Pyramid has been completely satisfied and is therefore not entitled to relief in this action.

International's final argument is that the law of the Cayman Islands would not permit "piercing the corporate veil," and that Pyramid's complaint must accordingly be dismissed. The parties have submitted affidavits from Cayman lawyers which purport to reach contrary conclusions on this question of law. However, the Court is simply unwilling to make a relatively uninformed summary decision, based upon affidavits, regarding a question of foreign law. This is particularly so when, as here, the positions taken in the affidavits are themsleves less than crystal-clear.[1]

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[1]In the affidavit submitted by International of John E. Stafford, Esq., a Caymans lawyer, Mr. Stafford states that "it is clear under Caymans law that unless [International] were shown to have employed WIB as a tool or as its alter ego to defraud Pyramid there is no basis for a claim by Pyramid against [International]; the mere fact that the subsidiary has incurred liabilities whether in contract or in tort will not expose the parent

For the foregoing reasons, it is, by the Court, this 29th day of December, 1988,

ORDERED, that Pyramid's motion to dismiss shall be, and hereby is,

FURTHER ORDERED, that the stay of discovery previously entered in this action shall be, and hereby is, lifted; and it is

FURTHER ORDERED, that the parties to this action shall have until March 29, 1989, to conduct such discovery into the matters alleged in Pyramid's complaint as may be required to support any additional dispositive motions, with such motions to be filed by April 29, 1989, and responses thereto in accordance with the local rules of this Court.

CHARES R. RICHEY
UNITED STATES DISTRICT JUDGE

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to liability without the parent being directly involved in the conduct giving rise to liability." *Id.* at 4. Frankly, it appears to the Court that this statement of the law is not materially different than typical United States law on this question, and is not, in substance, much different than the standard described in the affidavit of Pyramid's Caymans lawyer. Owen Merren.

Counsel — Pyramid Securities Limited v. International Bank

Plaintiff;

Michael J. McManus
Jackson & Campbell, P.C.
Suite 300 South
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Defendant

Sheila J. Carpenter
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0128

Of Counsel (defendant):
Jeffrey P. Hahn
12th Floor
4601 N. Fairfax Drive
Arlington, Virginia 22203
(703) 875-3689